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THE

CHANCERY PRACTICE

OF THE

STATE OF NEW-YORK,

BY

JOSEPH W. MOULTON,

Solicitor and Counsellor

VOL. I.

NEW-YORK:

O. HALSTED, LAW BOOKSELLER,

Corner Wall and Broad-streets.

.....

1829.

Southern District } ss.
of New-York, }

BE IT REMEMBERED, That on the 27th day of October, A. D. 1829, in the fifty fourth year of the Independence of the United States of America, JOSEPH W. MOULTON, of the said District, hath deposited in this office the Title of a Book, the right whereof he claims as Author, in the words following, to wit:

"The Chancery Practice of the State of New-York, by "Joseph W. Moulton, Solicitor and Counsellor." VOL. I.

IN CONFORMITY to the Act of Congress of the United States, entitled "An act for the Encouragement of Learning, "by securing the Copies of Maps, Charts, and Books, to the "Authors and Proprietors of such Copies, during the Time "therein mentioned;" and also to an Act, entitled, "An Act "supplementary to an Act, entitled, "An Act for the Encour- "agement of Learning, by securing the Copies of Maps, Charts, "and Books, to the Authors and Proprietors of such Copies, "during the Times therein mentioned, and extending the Be- "nefits thereof to the Arts of designing, Engraving, and Etching "historical and other Prints."

FREDERIC I. BETTS,

Clerk of the Southern District of New-York.

I have examined a Treatise on the Practice of the Court of Chancery of this State, by Joseph W. Moulton, Esq. a Solicitor and Counsellor of the court. The research of the author has been extensive, and the work is well calculated to aid the practitioner through the intricacies of a chancery suit in the various shapes it may assume. The former practice of the court, and the recent decisions relative thereto, either in this state or England, have been applied to the system as it will exist under the revised statutes and new rules which are to go into operation on the first of January next. Such a work was much wanted, and it will be almost indispensable to the library of every solicitor.

R. HYDE WALWORTH.

New-York, October 26, 1829.

PREFACE.

The present volume embraces the practice which falls more within the province of the solicitor than that of the counsel. The original plan of the writer was to divide his work into three parts, containing, 1. Theory of the Practice; 2. Practice; 3. Forms; and to preserve the same chapters and sections throughout, so that the analysis of one part would be that of the whole. This simple arrangement would, while it kept the departments of counsel, solicitor, and clerk, distinct, render access to the theory, practice and form perfectly easy, and free the book of the incumbrance and confusion of mingled subjects. The plan will be followed in the next volume, which will contain forms, references to forms and authorities, explanatory notes, and practical directions, with an additional chapter of directions for conducting the prosecution and defence of particular suits, in reference principally to the matter contained in both volumes. The theory of the practice may, at mature leisure, be ultimately superadded upon the same plan. The powers and jurisdiction of the court, the foundation of remedies, the doctrine of pleadings and evidence, and many subjects of minor consideration, which in the present volume have been slightly treated, will then he enlarged upon, and constitute probably a useful manual of reference for the counsellor as well as the solicitor. The plan upon which the subject has been drawn out is sufficiently developed in the subjoined analysis, and will, it is hoped, upon thorough examination, be approved by the practitioner. It is an attempt, at least, to reduce the subject to a system—to exhibit a chain of connection throughout, rendering matters which had been usually thrown at the end of books immediately subservient

to the regular commencement of suits, and presenting the progressive stages of proceeding in their natural order. The manner in which the plan has been executed is now submitted in the present portion of the work. It does not comprehend all that might have been said. A considerable portion of the practice, particularly in relation to the subjects of the concluding chapters is reserved for the second volume, where a clearer view of certain proceedings may be taken in connexion with the forms themselves. The second volume, therefore, will not only supply what has been omitted in the first, but correct any errors which upon a careful examination of the first previously to the publication of the second, may be detected.

I cannot permit this opportunity to pass without expressing the deep obligation I feel to his honour the Chancellor for the favourable opinion which he has been pleased to express of my labours in this undertaking, and for the valuable forms which he has given to me, and which will be incorporated into the second volume. Nor can I deny myself the pleasure of acknowledging the favour I have received from George W. Strong, Esq. This eminent practitioner, amid the incessant duties of his profession, has spared time to listen to a considerable portion of the manuscript before it went to the press; and I am indebted to him for several important corrections of the original matter.

New-York, October, 1829.

The English authorities of recent publication have been generally cited at length, viz. Bligh's New (Parliamentary Rep. (Lond. 1829.) Simon's Reports, (1829.) Jacob Chy. Rep. (1828.) Younge and Jervis' (Exch.) Rep. (1828-9.)

The following also are referred to: M'Cleland and Younge's(Exch.)Rep. M'Cleland's(Exch.)Rep. Daniell's Rep. Glyn and Jamieson's Cases in Bankruptcy. Wilson's Chancery Rep. Turner and Russell's Chancery Rep. Simons and Stuart's Chancery Rep. (Sim. & Stu.)

Other authorities cited will generally be recognized as, Vesey and Beames, (Ves. & B.) Jacob and Walker, (Jac. & Walk.) Maddock's Reports, (Mad.) Merivale's Rep. (Meriv.) Price's Reports, (Equity side of the Exch.) Peere Williams, (P. W.) Atkins. (Atk.) Vesey and Vesey junior, (Ves.) (Ves. jr.) Schoales and Lefroy, (Sch. & Lef.)

The Revised Statutes are cited by the letters (R. S.) The new rules of court by the letter (R.) Johnson's Reports, by (J.) Johnson's Chancery Reports, (J. Ch) Caine's Cases in Error, by (C. C. in E.) Hopkins' Reports, (Hopk.) Wendell's Reports, (Wend.) Cowen's Reports, (Cowen.) Paige's Chancery Reports, (Paige)

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THE PRACTICE

OF

THE COURT OF CHANCERY.

CHAPTER I.

THE COURT.

THE general powers, duties, and jurisdiction of the Court of Chancery of the State of New-York, are co-extensive with those of the High Court of Chancery in England, with the exceptions, additions, and limitations created by the constitution and laws of the state.(1)

§ 1. Territorial Limits.

The territorial limits of the court are the prescribed boundaries of the State, and its process may issue into every part of it; not excepting places ceded to the United States for public uses;(2) for the intention of such cessions would create an implied reservation of civil jurisdiction, always essential to the integrity and unfettered exercise of state sovereignty. For purposes of local jurisdiction the state is divided into eight circuits, corresponding with the eight senatorial districts; subject to alterations, (3) but unalterable until the census in 1835. The *First* consists of the Counties of New-York, Richmond, Kings, Queens, Suffolk; the *Second:* Westchester, Putnam, Dutchess, Rockland, Orange, Ulster, Sullivan, Delaware; the *Third:* Greene, Columbia, Albany, Rensselaer, Schoharie, Schenectady; the *Fourth:* Saratoga, Montgomery, Hamilton Washington, Warren,

§ 2. Local Circuits

(1) 2 R. S. 173. s 36.
(2) See 1 R. S. 61. 65, 66. See 7 Cowen, 471
(3) See Constitution, Art. 5. s. 5. and Art. 1. s. 5. R. S. 1 84. and 2 R. S. 231.

CHAP. I.

Clinton, Essex, Franklin, St. Lawrence; the *Fifth*: Herkimer, Oneida, Madison, Oswego, Lewis, Jefferson; the *Sixth:* Otsego, Chenango, Broome, Cortland, Tompkins, Tioga, Steuben; the *Seventh:* Onondaga, Cayuga, Seneca, Ontario, Wayne, Yates; and the *Eighth:* Livingston, Monroe, Genessee, Orleans, Niagara, Erie, Allegany, Cattaraugus and Chautauque.

§ 3. Powers of Court in the Chancellor.

The powers of the Court are vested in the Chancellor; (4), and may be exercised by him throughout the state.

The vice Chancellors and their powers.

Every Circuit Judge of the Supreme Court, within the limits of his Circuit, is a Vice-Chancellor, and has, concurrently with the Chancellor, and exclusively of any other Circuit Judge, all the original jurisdiction and powers vested in the Chancellor in all causes and matters in equity, and in all matters of which the cognizance is, or shall be vested in the Chancellor by any statute in these cases: 1. where such causes and matters arise within the Circuit of such Judge; 2 where the subject matter in controversy is therein situate; 3 where the persons proceeded against, or either, reside within such limits, subject to the appellate jurisdiction of the Chancellor.

§ 4 Limitation of their powers.

The Vice-Chancellors have no power over the orders or decrees of the Chancellor; no appeal from any Vice-Chancellor of another circuit, inferior court or Surrogate, excepting appeal expressly given by law; or a cause or matter is referred by the order of the Chancellor to the decision of a Vice-Chancellor. In all other cases than those in which Vice-Chancellors are vested with the powers of the Chancellor as enumerated, proceedings are had before the Chancellor as heretofore practised; but the hearing of any motion, or cause set down for hearing before him, may be referred by his order to any Vice-Chancellor, subject to his appellate jurisdiction. The power of taxing costs is vested in the Vice-Chancellors, and such masters as the Chancellor may appoint; the Vice-Chancellors execute such other powers and duties in relation to any matter pending as the Chancellor from time to time directs, subject in all cases to his appellate jurisdiction. When he is a party, or interested,(5) the bill is addressed and filed before a Vice-Chancellor, who

§ 5. Chancellor may extend them, subject to appeal.

(4) 2 R. S. 167-8-9. see 2 R. S. 273.
(5) As to the degree of interest, 1. Hopk. 1.

proceeds thereon as, and with all the powers of a Court of Chancery, and appeals are then directly to the Court of Errors. (5) If a Vice-Chancellor is interested, or was of counsel or solicitor, or is unable to hold his stated term, any other Vice-Chancellor, or the Chancellor himself, may hold the term.(6) The Chancellor prescribes by rule, the time and manner in which proceedings may be had, causes brought to hearing pursuant to the provisions of law, and the cases which may be reheard before a Vice-Chancellor. He may, from the difficulty of the case, or any other reason, order, on special application, any cause which might be heard by a Vice-Chancellor to be brought to hearing before himself.(7) He is empowered to make all the rules of the Court, with a special direction: 1 To the abbreviating of bills, answers and other proceedings. 2 The expediting of the decision of causes: 3 diminishing of costs: 4 remedying of abuses and imperfections in practice.(8)

§ 6. When Chr. or vice Chr. is party or interested.

§ 7. Further powers of the chr.

§ 9. Tenure &c. of office.

The appointment,(9) tenure of office,(10) disqualification to hold another office, or to act as solicitor or counsel, and the salary of the Chancellor and Vice-Chancellors are regulated by the constitution and revised statutes. The original and appellate powers already considered in reference to those constituent officers might be usefully followed by a sketch of the general exclusive and concurrent jurisdiction of Chancery.(11) But the design of this treatise being purely practical, all theory not intimately blended with the subject, must at present be omitted. (See Preface.)

The Chancellor and Vice-Chancellors are,

REUBEN HYDE WALWORTH, Chancellor.

§ 9. Chr. & Vice Chrs.

Vice-Chancellors: 1 Circuit, Ogden Edwards: 2 James Emott: 3 William A. Duer: 4 Esek Cowen: 5 Nathan Williams: 6 Samuel Nelson: 7 Daniel Mosely: 8 John Birdsall.

(5) 2 R. S. 169, s 7.
(6) ib. 177. s 53.
(7) 2 R. S. 178. s. 63.
(8) ib. 175. s 46.
(9) Const. A. 4. s. 7. 1 R. S. 106.
(10) ib. A. 5. s. 3. 1 R. S. 117. 116. 190. const. A. 1 s. 13.
(11) The subject in controversy must now exceed the value of $100. See 2 R. S. 173. s 2. 1 Hopk. 112. Contra 5. J. Ch. 276. Contra. See 1 Hopk. 119.

CHAP. I.

OFFICERS.

§ 10. Officers.

The officers of the Court are: 1 The Chancellor; 2 eight Vice-Chancellors; 3 The Register and his deputy; 4 The assistant Register and his deputy; 5 eight clerks of Vice-Chancellors' circuits, the Register being clerk of the third, the assistant of the first, and the two former clerks of chancery of the second and fifth circuits; 6 ten Masters in New-York, five in Albany, and three in every other county: an Injunction Master and a taxing Master for each circuit are selected by the Chancellor from the above number;(12) 7 three examiners in the city of New-York and three in each county of the state; 8 two Sergeants-at-Arms; 9 the Sheriffof each county; 10 Commissioners to take affidavits to be read in Chancery; 11 a Chancery Reporter; 12 Counsellors and Solicitors. Those officers whose powers and duties assimulate might be subdivided into classes: The first comprising those of the first and second enumeration. The second, of the third, fourth and fifth. The third, of the sixth and seventh. The fourth of the eighth and ninth. The three last have their distinct departments.

§ 11. General provisions

The general provisions of law with regard to all officers, their oath,(1) liability to arrest,(2)impeachment and indictment,(3) and upon what contingencies their offices become vacant,(4) the specific provisions in relation to the appointment, powers, duties and fees of the officers above enumerated, may with some slight exceptions be omitted in this treatise. All the officers are appointed to hold during the pleasure of the Chancellor, excepting deputies who are appointed by the Register and assistant, Masters and Examiners, who like the Chancellor and Vice-Chancellors are appointed by the the Governor and Senate, and the Sheriffs who are elected by the people.

§ 12. Reg. Asst. Clerks.

The powers &c. of the Chancellor and Vice-Chancellors have been alluded to. The *Register, assistant Register*

(12) See R. 30. 129. 1 R. S. 96. & Laws. of 52. Sess. ch. 272.
(1) Const. of N. Y. a. 6.
(2) 2 R. S. 290. s 86.
(3) Const. a. 5. s. 2.
(4) 1 R. S. 121-2.

and clerks,(5) whose general duty is to enter and register titles of causes, memorandum of proceedings, minutes of court, docket decrees, enter common orders, special orders and decrees, and the receipt, investment, payment and expenditure of monies brought into court,(6) must keep open office for business every day except Sundays and that of the anniversary of American Independence, from 9 to 12 in the forenoon, and 2 to 5 in the afternoon.(7) Their fees are regulated by statute,(8) and their allowance for monies paid out in cases not therein specifically provided for, by rule of court.(9) The Register must reside at Albany in the third circuit, the assistant Register at New-York in the first. The former clerks of Chancery remain at Utica in the fifth, and Poughkeepsie in the second circuit. The four additional clerks will keep their offices in such parts of their circuits as are to be designated.

§ 13. Masters and Examiners.

Masters and Examiners are assistants to the Chancellor and Vice-Chancellors in the collateral execution of their duties; derive their appointment from the same source, and have a statutory rank as judicial officers.(10) Masters must be Counsellors of the supreme court, or Solicitors or Counsellors in chancery.(11) Their powers,(12) duties,(13) fees,(14) and commissions,(15) tenure,(16) and liability to suspension and removal from office,(17) as well as Examiners, are, in many respects regulated by the statutes and rules. They must reside within the county or place for which they are appointed(18) and cannot act in any matter in which they are Solicitors or Counsel, or which is conducted by a person with whom they are directly or indirectly connected in business.(19) The prescribed powers and duties of the Injunction Master, and the Taxing Master for each circuit,(20) in connexion with

(5) See 2 R. S. 169, 170, 171. 479 629.—1 R S 96. 108-9. 120 116, also, R 127. as to bonds, deposits, &c.
(6) R. 6. See R. 7.
(7) 2 R. S. 285. s. 54.
(8) 2 R. S. 627-9.
(9) R. 124.
(10) Const. A. 4. s. 7. 1 R. S. 96. 105-7.
(11) 1 R. S. 106.
(12) 2 ib. 283. s. 42.
(13) ib. & R. 9.
(14) ib. 624-6 s. 7-9. See 1 Hopk. 228.
(15) R. 124.
(16) 1 R. S. 106. s. 6.
(17) ib & 2 R. S. 283. s 43. & s. 42.
(18) 1 ib 101. s 9.
(19) 1 ib. 107.
(20) See. R. 30. 129. 9.

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the excercise of the same powers by the Vice-Chancellors, will be referred to in another part of the treatise.(20)

§ 14. Sergeants and Sheriffs.

There are two Sergeants-at-Arms; one at Albany, the other at New-York,(21) who perform such services in and about the Court as the Chancellor directs.(22) The Sheriff of every county is an officer of the court for executing its process, must attend the stated term therein held by the Chancellor or a Vice-Chancellor, perform all the duties of a Sergeant-at-Arms and execute all process and orders of the court in any county of the state.(23) Their office hours for business are like those of the Register, &c. and they are entitled to the same fees as Sergeants-at-Arms.(26) Sergeants are appointed by the Chancellor, but Sheriffs are chosen by the electors of their respective counties every three years, and as often as vacancies occur; but are ineligible for the next three years after the termination of their offices.(27)

§ 15. Commiss'rs.

The specific power of so many commissioners to take affidavits to be read in Chancery, as the Chancellor may appoint, requires no explanation. The mode in which this duty is performed, will appear in another part of the treatise.(28)

§ 16. Reporter.

The chancery reporter must be a counsellor of five years standing. He derives and holds his appointment from the Chancellor.(29)

§ 17. Solicitors and Counsellors.

Counsellors and Solicitors are admitted and licensed by the Chancellor, on examination before him or a Vice-Chancellor, pursuant to a special order previously obtained from the Chancellor.(1) And when admitted, hold their offices for life, subject to suspension or removal. To entitle the applicant to an order for examination as a Counsellor, he must have been such in the supreme court, or practiced therein as an Attorney or in chancery as Solicitor—three years. To authorise the entry of such order for examination as Solicitor he must have been an attorney of the supreme court, or have served a

(20) See ch. VI.
(21) 1 R. S 96.
(22) 2 R. S. 172. s 28.
(23) 2 R. S. 172. s. 29-31.
(26) ib. 629. 13.
(27) Const. A. 4. s. 8.
(28 See verification, ch. II. 1 R. S. 96.
(29) 1 R. S. 108. s. 18, 19.
(1) R. 11. See 1 R. S. 108. s. 20.

regular clerkship of seven years with a Vice-Chancellor or practicing Solicitor, after filing a certificate of the commencement of such clerkship. But four years or less, of classical studies pursued after he was fourteen, may be allowed as equivalent for a like period of clerkship. The extent of such allowance must be settled by the Chancellor or a Vice-Chancellor, and an order entered at the commencement of the clerkship,(2) when admitted the constitutional oath of office is taken and subscribed in open court, and a licence obtained under the signature of the Chancellor.

§ 18. Duties, powers and responsibility.

The duties, privileges, authority and responsibility of a Solicitor are analogous to those of an Attorney.(3) He is bound to the same fidelity, and has the same lien for his costs.(4) His neglect is the neglect of his client.(5) His admissions and consents,(6) unless retracted by order on motion(8) are binding on his client, who has no power to displace him excepting on an order of the court.(9)

The duties, privileges and responsibility of Counsel are also in some respects like those of Counsellors at Law, but in others peculiar; and relate to their signature, to pleadings and proceedings, such as petitions,(11) bills,(12) answers(13) pleas;(14) to their liability for any scandalous matter therein and thus sanctioned,(15) to their and Solicitors' privilege to refuse discovery of facts or deeds, confided professionally(16) a privilege which belonging to their client, they cannot waive;(17) to their latitude in pleading or

(2) R. 12. As to *Agents*, see under head of *Services*, ch II.
(3) see 1. Hopk. 369.
(4) see. 6. J. Ch. 317. 342. 1 J. Ch. 22. 6 Ves. 425. 1 Swans. 1. 84.
(5) 1 Hopk. 8.
(6) R. 46. 121.
(8) See Bla. 57. appx.
(9) 1 Hopk. 369. 370.--1. vid. 1 Sch. & Lef. 315.
(11) 1 Jac. & Walk. 673. n. 7. Bro. P. C. 9. Buck. 429.
(12) 5 Ves. 547. 550. 5 Madd. 278. 1 Dick. 68. 1 Sim. & Stu. 99. 1 35. 1 Cary. 160. 117. 127.
(13) 2 Meriv. 1.
(14) Sed vid. 4 Madd. 366.
(15) 2 Fowl. 478. Colles' P. C. 245. 7 Bro. P. C. 9.
(16) 1 Ves 61. 1 Vent. 197. 2 Ch. R 16. 1 Ch. Ca. 277. 2 Atk. 523. 2 Freem. 5 Sed vid. 2 Ves. jr. 189. 1 Meriv. 115. 6 Madd. 29. 2 Atk. 524. Vent. 197. Nels. 81. 3 Rep. Ch. 56.
(17) See Bull. N. P. 284. nor can a solicitor afterwards act in a new suit between other parties so as to avail himself of the secrets entrusted. An injunction would go against him. See 19 Ves. 261. Coop. 80. sed vid. 4 Price 353.

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stating their case,(18) and to their privileges and remedy, like Solicitors, for their fees.(19)

A Solicitor is personally liable for costs on dismissal of bill or otherwise, for making plaintiffs' parties without their authority,(1) which in England must be a special, to commence, but may be a general authority, to defend (2); for instituting improper and unfounded proceedings from interested(4) or fraudulent views,(5) or if lawfully commenced, conducting them from the same motive,(6) or for a gross,(7) or wilful neglect,(8) of professional duty. But independently of his liability for costs, it has been long held that the court under its general jurisdiction over Solicitors,(9) would exercise it, in a summary way by attachment as at law, where a Solicitor grossly neglected his client's concerns,(10) or would strike him off the roll for malpractices.(11) Solicitors and Counsellors may be suspended or removed on charges filed and served, after hearing or defence, for deceit, malpractice or misdemeanor; and a suspension or removal in chancery would operate as such in all courts.(12) A Solicitor or Counsellor is liable to fine and imprisonment, or treble damages, or to suspension or removal according to the nature of the offence, for certain malpractices: as deceit or collusion, wilful delay of his client's suit for gain, wilfully receiving money or allowances on account of money not laid out, or for which his liability has not been pledged, allowing his name to be used in suing out process or in prosecuting or defending; buying or being concerned in buying any chose in action to prosecute, lending or advancing any consideration as an inducement for the leaving of any matters for collection: but bona fide transactions, in the purchase, loan, or advance, are exempted from the operation of the law.(13)

§ 19. Suspension, removal.

(18) 3 Dow. 273. 3 Ves. 495.
(19) 3 Swans. 93. 1 Ch. R. 38. 2 Atk. 332. 1. Shc. & Lef. 315. see 1. J. Ch 22. Grant. 473. Har. 392-95. 6 J. Ch. 317. 342. Wy. P. R. 396. 6 Ves. 425. 1. Swans. 1. 84.
(1) 1 Jac. & Walk. 456-8-9. 674. 1 Dick. 351. 2 Cox 235. 240. 1 Ves. jr. 196. 200. 3 Meriv. 12. 1 Ch. Ca. 71.
(2) 3 Meriv. 12.
(4) 1 Madd. 78. 13 Ves. 62. 3 Atk. 813. see also, 3 Ves & B. 92.
(5) 2 Ves. jr. 304. 2 Madd. Pr. 185. 15 Ves. 164. 2 Atk. 324. 328
(6) 1 Atk. 139. 3 Atk. 813.
(7) 1 P. W. 592. See Hullock's costs, 482.
(8) See 5 Madd. 21. 16 Ves. 133.
(9) 6 Ves. 425.
(10) 1 Dick. 129. Wy. Pr. R. 397.
(11) 2 Atk. 173.
(12) 1 R. S. 108.
(13) 2 ib. 287-8.

CHAPTER II.

PETITION AND BILL.

THE revised statutes and rules, re-organising the court, and remodelling its practice, have conferred upon petitions without bill, a new rank and dignity. The principal proceedings by bill, excepting incidental peculiarities, may be applied to petition causes. Receivers may be appointed; estates be partitioned or sold; process of injunction may issue, pro confesso be taken or answers in certain cases be put in; hearing and rehearing, reference or feigned issue, appeal, enrolment of decree and process of execution, may be had in petition cases. It is obvious that proceedings bearing so close an analogy, admit some general arrangement, which, while it should preserve the specific difference, and throw the weight of its direction in the scale of petitions in general as strictly preliminary to bills, might form a useful source of reference for the purpose of illustrating, and of preserving unbroken, the regular chain of proceedings in causes by bill as well as by petition. The general rules which may be brought within the scope of such an arrangement will be considered in the present chapter under the following heads: 1 Petitions. 2 Services. 3 Intermediate steps to hearing. 4 Orders and decree. 5 Rehearing. 6 Appeal. 7 Costs. 8 Enrolment, execution, and cancelling the lien of record.

PETITIONS.

Petitions as, contradistinguished from motions,(1) are *written* applications to the power of the court for aid or relief, and will be considered: 1 in relation to their kinds, 2 their requisites.

(1) A motion is a petition not reduced into writing, and presented. Mos. 197. As to distinction between motion & petition see 13 Ves. 393 Newl. Pr. 142, 3. See motion, § 13, 14. orders, § 26. post.

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§ 2. Division or kinds.

1. They are: 1 *Original*, having no immediate connection with any other cause pending or to be brought. Original petitions, are in some cases concurrent with original bills; in others the only procedure. Proceedings for partition and sale, or for injunction and appointment of receiver, against certain incorporated institutions, are for example of the former class. But petitions for commission of lunacy, appointment of committee, for appointment of guardian and sale of infant's estate, and other cases hereafter enumerated, are of the latter class. When the remedy is concurrent, petitions are preferred, because generally less expensive and most expeditious. If a bill be filed where a petition would answer, no costs will be allowed,(1) unless an order be first obtained for that purpose. On the other hand, relief by petition rests in the sound discretion of the chancellor, under the circumstances of the case,(2) and where it would not meet the ends of justice, the court may deny the petition, and order a bill to be filed.(3)

§ 3. Preliminary petitions

2. *Preliminary*, being necessarily prior to the commencement of a cause by original petition or bill. The last case is an instance, viz. for an order for leave to file a bill. A petition for leave to prosecute as a poor person is also a preliminary petition. And some original petitions partake the nature of a preliminary, though not immediately or necessarily connected with any contemplated suit: an idiot lunatic,&c. must seek redress through the medium of his committee as his next friend, and the petitions for commission and committee are therefore preliminary steps.

§ 4. Collateral petitions & motions, ex parte or contested.

3. *Collateral*, or incidental to causes or proceedings commenced. Collateral petitions are in many cases concurrent with motions, as for an injunction, ne exeat, or receiver; but in some instances are the exclusive mode, as a petition to remove a cause into the circuit court of the United States, or petition of appeal to the court of errors. 4. Ex parte or non-contested and contested petitions. This subdivision has a regard more to the mode of proceeding than to the nature of the petition.(4)

(1) 1 Paige's Rep. 181.
(2) 10 J. 508. 517.
(3) 8 Cowen. 350. 355–7.
(4) Some of the English writers on practice divide petitions into two kinds, 1 ex parte, 2 cause petitions, the latter being no other than collateral. They are in point of proceedings, of *course*, or *special*: & are like common or special motion, most things which may be moved for of *course* may also be petitioned for,

§ 5. 2 General requisites.

All petitions and bills, unless the chancellor be a party(2) must be addressed "To the Chancellor of the state of New-York," without his name or any addition.(3) The matters therein set forth or avered, when sworn to, must be positively stated, or upon information, or belief only, according to the fact;(4) and, as petitions,(5) the affidavits in support of them;(6) bills and other pleadings and proceedings,(7) may be referred for impertinent matter or scandal; rendering the party liable to costs, and a deduction in taxation for unnecessary folio,(8) they should consist of averments and facts stated with brevity and precision, without inference and argument, and without recitals or long digressions as to matters immaterial and unnecessary, which constitute what is technically termed impertinence.(9)

§ 6. Engrossing, copying and comparing.

The petition or bill must be fairly and correctly engrossed, read, signed, (verified, when requiring an oath) subscribed or indorsed by the solicitor or party in person, properly paged, marked and superscribed: 1 All proceedings should be written in the English language, excepting technical terms, in a fair legible character, in words at length, excepting customary abbreviations, or figures,(10) without blots or interlineations. If in case of affidavit any alterations be made, they must be with a pen, not by erasure, and if not too much interlineated, the officer administering the oath will sign his initials against the interlineations.(11) No proceedings or copies not written fairly and legibly can be filed by the register, assistant register or clerks.(12)

§ 7. Affidavit, verification of petition, bill, &c.

An affidavit, it has been held, ought to name the title and place of residence of the party making it,(13) but it is now sufficient, if made by parties in causes, to describe them as plaintiffs and defendants, without their resid-

the matters of course by petition being for similar purposes to those of motions of course. Special petitions like special motions must be supported by affidavit, and served with notice, &c. (see post § 10) 1 Grant 341-2-3. Harr. 417.

(2) 2 R. S. 169. s 7.

(3) R. 10. R. S. *ib.* 177. s. 54.

(4) R. 18.

(5) 1 Jac. & Wal. 326. 18 Ves. 114. c. 1. Grant 243.

(6) 1 Dick, 112. 113.

(7) See R. 53, 54.

(8) R. 130. 2 R. S. 653.

(9) 4 J. Ch. 437. See *post* ch. VIII.

(10) 2 R. S. 275. s 9. R 95.

(11) 1 Grant 239. 240. Ld. Clarend. Ord. 1661. Be. Ord. Ch. 210. 8 Price 510.

(12) R. 95.

(13) 1 Newl. 165.

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ence(1)also, the court, title of the cause or matter in which it is made,(2) and must not be evasive,(3) run into unnecessary and irrelevant statements, or contain any scandalous matter, for as before observed, [§ 5] it may be referred for scandal,(4) and impertinence,(5) and in an affidavit of service where the whole petition was recited, the court in England made the attorney who drew it pay the costs of it.(6) There, also, when service is on a party's clerk in court, the affidavit thereof must state his name.(7) It is a proper caution in affidavits to add "or to that effect" not swearing expressly to words spoken.(8) Vying and re-vying in affidavits is entirely discountenanced.(9) If contradictory affidavits of the same person are produced, the court may require personal examination ;(10) but an affidavit may be amended and re-sworn, if no sufficient cause be shown on an order for that purpose obtained on motion.(11) When filed upon interlocutory proceedings, affidavits are to be considered as matters of record.(12)

The petition or bill, whenever verified, and affidavits should be read, understood and approved, and if the deponent be illiterate, cannot write or read, and therefore makes his mark, should be read to him. This is the English practice, in case of affidavits, and our own in relation to petitions and bills. The jurat in the former case must superadd the words " having been first read over to the said deponent—who appeared perfectly to understand and approve the same."(14) The jurat in the latter will be presently given. The officers authorised(15) to administer oaths(16) in judicial proceedings

(1) 2 Madd. 445.
(2) 1 Newl. 165. & auths.
(3) 2 Eq. Ab. 14. 4 Vin. 440.
(4) 2 Fowl. 400. 1 Dick. 112.
(5) 2 Atk. 391. 1 Dick. 113. order made on plaintiff's motion to refer the affidavit of her own solicitor for impertinence. ib. Sed vid. 19 Ves. 113.
(6) 1 Atk. 139.
(7) Newl. 165. c. 1 Ves. Jr. 141. Sed. vid. Harr. 399.
(8) 2 Atk. 60. Ld. Hardwicke often objected to affidavits for the want of that addition.
(9) 2 Atk. 14.
(10) 2 Ves. 26.
(11) 2 Fowl. 401.
(12) And the facts disclosed by them were viewed by the court in deciding upon the validity of a plea, 2 Bligh 595.
(14) 1 Grant 240. See R. 18.
(15) 2 R. S. 284 s. 49, 50.
(16) Oaths 2 R. S. 407-8. Affidavit taken before a solicitor in the cause cannot be read. 6 Price 231. 3 Atk. 813.

are in chancery, the Register, assistant Register, Masters, Examiners, and any commissioner therein appointed for that purpose; and any judge or clerk of a court of record, circuit judge, supreme court commissioner, or commissioner of deeds.(7) If out of the state the proceedings must be taken and authenticated before such officer, and in the mode as directed by the statute.(8) The form of verifying is adapted to the religious principles, or national custom of the deponent or affirmant, as that which will be most binding on his conscience. If he have scruples against taking an oath in the usual form by kissing the gospels, he may swear by uplifted hand, if a Quaker by affirmation;(9) if a Jew on the pentateuch. A foreigner must be sworn through the medium of a sworn interpreter.(10)

§ 8. Jurat.

The common jurat to affidavits is "sworn before me &c." to which the words before recited must be added according to the English practice, if the party be illiterate; and the jurat by that practice must be on the right hand side at the foot of the affidavit, and the deponant's signature on the left.(11) The special jurat to petitions, bills or answers, must state the substance of the oath, and the oath must in substance be, "that he has read the petition bill or answer, or heard it read and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated to be on his information or belief, and as to those matters he believes it to be true."(14)

§ 9. Finishing, Requisites, Swearing, Annexing, Papers, Paging, &c.

All petitions grounded on *facts* not immediately before the court must be verified by oath(15) or as well as spe-

(7) 2 R. S. 284. s. 49. 50.

(8) pt. 3. c. 7. t. 3. s. 25. viz: In cases where by law the affidavit of any person residing in another state of the United States, or in any foreign country, is required, or may be received in judicial proceedings in this state, to entitle the same to be read, it must be authenticated as follows: 1. It must be certified by some judge of a court having a seal, to have been subscribed and taken before him, specifying the time and place where taken. 2. The genuineness of the signature of such judge, the existence of the court, and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof.—2 R. S. 396.

(9) See 2 R. S. 407-8.

(10) 1 Vern. 263. See 1 Atk 19. ib. 20. as to oath of infidels generally. See 4 Bro. C C. 89. 3 Bro. C. C. 263. 1 Grant 108. Hoff. Mr. 252. 352. and appx. No. 72-75. 1 Dick 103. 2 Ves. 325. 2 Fowl. 159. 160. 2 Cox 190.

(11) Grant 240. Harr. 398.

(14) R 18.

(15) 1 Hopk. 101.

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cial motions, be supported by affidavit of the material facts.(16) The petition or motion may be founded on a certified copy of some public document, order of court &c. which must be under the seal of the office unless of the same court.(17) Sometimes the certificate or consent of third persons, as a proposed guardian or next friend, or inventories of property or other schedules are referred to and annexed. A draft order or decree or the minutes thereof in conformity to the prayer of the petition or bill may, and it is advisable that it should be prepared, and if to a petition, annexed when presented. In contested petitions it is also advisable as in bills to conform to the general rule(18) that the solicitor or officer of the court who draws any pleading, deposition or report, or enters any decree, must distinctly number and mark each page; and page and mark in the margin all copies for the parties or the court so as to conform to the original draft or entry and to each other; no allowance being permitted upon taxation of costs for copies not thus paged and marked. The petition or bill being verified, subscribed or endorsed with the name of the party in person, or his solicitor and the signature of counsel (19) obtained; endorsed also with the words "before the chancellor" or "before the vice chancellor"(20) and properly entitled, the complainants name being endorsed *first* on all papers, (21) is prepared for presentment, or for copying and:

2 SERVICE.

§ 10. Services general rule.

It is a general rule that all parties proceeded against, having an interest to appear and oppose are entitled to service of all papers; petitions, affidavits, certificates, schedules with notice of presenting the same, and of the special motion thereon or of any other special motion or of hearing, for a period of time, in the manner and under the limitations hereafter described. The rule will be considered: 1. With regard to the period and mode of service in original or collateral proceedings: 2. Before actual appearance of the adverse party: 3. After and first, where he appears in person, secondly, by solicitor, and the service is on him, or his agent, and if none, by affixing.

(16) 1 Grant, 240. Harr. 398.
(17) 2 R. S. 403-4. s. 59, 60.
(18) R. 95.
(19) See ch. 1. § 18.
(20) R. 7.
(21) R. 95.

§ 11. How long, how computed how made.

1. If the petition, notice of motion and other proceedings are of such a nature, according to the general rule, as to entitle the adverse party to service, and he reside within 50 miles of the place where the court is to be held, the service must be at least four days; if over fifty miles six days; if over one hundred, eight days.(1) The computation upon which, and upon all services is one day inclusive, one exclusive; but if the time expire on Sunday the whole of the succeeding day is included.(2) The object of such service, in the incipient stage of proceedings, is like that of process by bill, to apprize the adverse party and afford him the opportunity of appearing and opposing. If the service is brought home to him, and can be proved, it is sufficient. If personal service cannot be made, a substituted service as in other cases may be obtained, if not allowable in the first instance as in case of subpœna.(3) In England, though the petition cannot be read unless an affidavit of personal service be first filed, (4) yet where the petition requires personal service on a party and he cannot be found, an order on special motion founded on affidavit of the fact may be had, that service be by leaving a copy at his abode, or with one of his family.(5)

§ 12. When no service thereon order, *nisi causa*, example for injunction receiver. When no service required.

2. If the petition should be presented as ex parte, without previous service, the order obtained, would be in effect nisi only, subject to be set aside with or without costs, on good cause shown.(6) In extraordinary applications, whether original or collateral, before or after appearance, where irreparable mischief or serious injury would result from delay, it is the practice here, as in England(7) not only to receive applications without previous service, but to allow them instanter; the order nisi thereon, being subject to be set aside on cause shown, otherwise confirmed or made absolute(8) upon compliance with the conditions on which it may be granted, agreeably to the following rule:—If a party be entitled to an order to stay proceedings or for temporary relief until he has time to give regular notice of a motion, or of presenting a petition *for any purpose*, he may make an ex parte application

(1) R. 89.
(2) R. 122. see 1 Hopk. 364. 5. Cowen 420.
(3) see R. 21. *post* ch. vii.
(4) 4 Madd. 395.
(5) 1 Grant 242, or sometimes on the attorney of a person residing abroad. see 3. Madd. 116, Newl. Pr. 164.
(6) See 1 Paige 39. Bla. 208-9. see as to orders nisi § 30 *post*.
(7) 1 Grant 243.
(8) vid. Bla. 206-7.

CHAP. II. to the court, for an order to the adverse party to show cause why the motion or the prayer of the petition should not be granted, and to stay the proceedings or for other temporary relief in the mean time. The adverse party must be served with a copy of the order and of the petition, affidavit or certificate on which it is founded, the same length of time before the day of shewing cause (as before stated [§11.] and double time if on an agent of solicitor or by affixing as hereafter mentioned) as required in ordinary cases of special motions, unless the court specially direct a shorter notice.(9) An example of such an application is where an original petition is presented under the act concerning fraudulent bankruptcies of incorporated companies to suspend the operation of an insolvent bank, for injunction, and appointment of receiver,(1) in which case a creditor may petition, temporary injunction and an order issue for the company to show cause why the prayer of the petition should not be granted, and a subsequent reference to a master to ascertain and report the fitness of a receiver and to receive nominations therefor from the parties interested: upon his report, and no sufficient cause shown, an order for injunction to restrain further operations, &c. and for appointment of receiver will be granted.(2) So in ordinary cases by bill, although the general rule is that a receiver should not be appointed without notice to the parties interested, (3) yet this rule is subject to exceptions in special cases where irreparable injury would be sustained by the delay. A receiver will be appointed without notice upon the application of the complainant, where the defendant has absconded to prevent service of the subpœna to appear and answer the bill, or has left the state and is not expected to return for several months, and has no residence or place of business where a subpœna can be served. The defendant however, has a right to apply for relief against the order if he can show any good reason on the merits for discharging the same.(4)

These rules it will have appeared, partly apply to proceedings after as before appearance. But further, after service has once been made, whether by petition or sub-

(9) R. 114. R. 89.
(1) see 1 Paige 85.
(2) ib. In the matter of the Franklin Bank. See also 1 Hopk. 596, 587, 354. 1 John. Dig. 189, 279.
(3) vid. Coopers R. 31. 2 Madd. 232.
(4) 1 Paige 17.

pœna no service of notices or papers in the ordinary proceedings in the cause is necessary on a defendant who does not appear.(5) *After appearance*, the rule is, 1, that services on a party prosecuting or defending *in person* other than an officer of the court, may be personal, or if absent, at his place of residence or business, or if none, by affixing in the office of register assistant-register or clerk (6) of the circuit where the cause is pending, but for the usual time required; [§ 11] or 2, where a solicitor is employed for either party the service must also be made within the same time [§ 11] in proportion to the distance of his residence from the place of holding the court,(7) or if on an agent, double that time,(8) (that is 8, 12 or 16 days.) For, every solicitor must have an agent within two miles of every clerk, register or assistant register's office, excepting at the place where the solicitor keeps his. The agents may be those officers, or a solicitor, or other person specially authorised by the chancellor. The appointment must be signed by the solicitor, set forth his residence, be filed, and an agency list be kept in the register assistant and clerk's offices.(9) Solicitors not residing in the same county or within forty miles of each other, may serve papers on an agent, residing in the circuit where the proceeding is before a vice chancellor, or at Albany, New-York or Utica if before the chancellor. If no agent, and the solicitor do not reside at the place of service, the notice or paper may be affixed in the office of register or assistant-register or clerk at such place.(10) But such service must be for double time, and if the solicitor reside more than 100 miles from the agent or office where service is made or affixed, the time must not be less than 16 days.(11) Modified by the preceding rules, the general principle first stated may be here repeated, that after appearance either in person or by solicitor, it is a well settled practice to give notice of every application where the adverse party has an interest to appear and show cause why the same should not be granted, orders for time and of a similar nature alone excepted. In any matter, therefore, pending, or on which a final order is sought a copy of every petition, the affidavits &c. relating to it, or in

After appearance.

In person.

Solicitor.

Agents.

(5) R. 16.
(6) R. 16.
(7) *ante* R. 89. § 11.
(8) R. 15.
(9) R. 13.
(10) R. 14.
(11) R. 15.

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support of any special motion, with notice of presenting or moving the same, must be served on the adverse party, or his solicitor (12) and for a regular motion day. For neither these, or can any ex parte motion or petition be heard excepting on a regular motion day or at term unless in case of emergency [§ 12] and by special permission. (13)

3. INTERMEDIATE PROCEEDINGS AND HEARING.

§ 14. Presentment of petitions, notice, common and special motions.

If the petition, &c. is served, the notice must express the object (that the petition will be presented and motion made that its prayer be granted;) the time, place, and officer before whom the petition will be presented, and the motion made. A notice is not good, by one not allowed to act as solicitor in the cause,(1) or not a party to the suit, for persons not parties are incompetent to make a motion.(2) The notice must briefly but fully express every thing intended to be moved for. The court will not in general extend the order beyond it,(3) or give costs of the motion unless costs are mentioned in the notice.(4) No notice of a motion, of course, is necessary, as it cannot be opposed,(5) even though grounded on affidavits and notice given.(6) This forms the distinction between *motions of course*, and *special motions*. The former are for ordinary interlocutory matters between the presentment of petition or filing bill, and the decree, where by the rules of the court the object is granted upon asking(7) for it. No notice is required or opposi-

(12) 1 Paige 39. 2. J. Ch. 425. see Blake 213.
(13) R. 4.
(1) 3 P. W. 103.
(2) 6 Madd. 29.
(3) 3 Newl. Pr. 144. Wy. Pr. R. 287. Grant 246.
(4) 18 Ves. 297.
(5) Newl. 143.
(6) Mos. 255.
(7) Newl. 143. Grant 244. The most usual motions *of course*, according to the *English* practice are: For the different *processes* against a defendant not appearing or answering where any motion is necessary, for a *messenger* upon sheriff's return of cepi corpus; for a common *injunction* for want of appearance and answer, or praying a *dedimus*; for order *nisi* to dissolve common injunction; to *refer* or amend bill; to *refer* a *suit by infant*, to see if it is for his benefit, by plaintiff that defendants *answer* may be *without oath*; to *revive*, the time for answering being expired; for *commission* to take defendant's answer in the country; for *time* to answer; to refer pleadings for *scandal* or *impertinence*; or answers or examinations for *in-*

tion allowed. The latter are, as has been stated, upon due notice and service. In England the motion though of course is made to the lord-chancellor, vice-chancellor or master of the rolls. Here it is supposed to be made, but in cases not actually requiring the *fiat* or *allocatur* of the chancellor, or a vice-chancellor, the order is drawn and entered with the register, assistant or clerk at the peril of the party taking the same. [See orders of course, § 28, 29.] If an order be obtained upon a false suggestion,(7) or contrary to the rules and practice, it will be set aside. [See § 54.]

Though the petition be addressed to the chancellor, yet if it relate to a cause in equity which according to the provisions of the statute(8) [See *ante* ch. 1. § 3.] may be heard by a Vice-Chancellor, it is presented to him (9) on a *regular motion day in vacation or term*, assigned for motions and petitions, viz :

MOTION DAYS, AND TERMS.

§ 15. Motion days and Terms.

1. *In any stated term:* The first day and every subsequent Monday, but on no other day without special order, motions or petitions, have preference over calender causes.(1)

2. *In Vacation:* The first and third Tuesdays of every month, before the chancellor at the capital in Albany: the second and fourth Tuesdays, before any vice-chancellor at his residence or place appointed by him, excepting in the first circuit, then at the City Hall, in New York, and in the third, at the capitol in Albany.(2)

Stated terms before the Chancellor.

The four annual stated terms of the court, for hearing *before the Chancellor*, are the fourth Mondays of January and August, at the capitol in Albany; the fourth Mon-

sufficiency; for voluntary *dismissal*, or dismissal for want of prosecution; for liberty to examine witnesses *viva voce* at the hearing; for a *commission* to *examine* a party defendant under a decree, on interrogatories exhibited by plaintiff before the master on the master's certificate; to refer *solicitors* bill to be taxed; that master be at liberty to make separate reports at the expense of party applying; & or order *nisi* to *confirm* master's eport.

Some of the proceding accord with our rules and practice, under certain specific modifications in mode and manner as will appear in the subsequent stages of proceedings.

(7) The suggestion is the *occasion* suggested on the indorsement, Grant 245.

(8) 2 R. S. 168.

(9) ib. s. 54.

(1) R. 5.

(2) R. 3.

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days of May and October, at the City Hall, in New-York.(2) They are appointed and altered from time to time by the chancellor;(3) but two terms must be annually held at Albany, and two at New-York, and each stated term, continues eight days at least, and longer if necessary.(4)

Stated terms before the Vice-Ch'rs.

The four annual stated terms for hearing before *each vice-chancellor*, are to be held at such times and places, usual for courts held in any county of his circuit, as he shall appoint; and when appointed, remain unalterable for two years.(5) Whenever fixed or altered, the order for that purpose is to be transmitted by the clerk of each circuit, to the Register, who will publish it, and constantly keep in his office a corrected statement of the times and places of the stated terms of all the vice-chancellors.(6) A stated or special term, may be held by a vice-chancellor, at the same time any such term is held by the chancellor; and if the former be unable to hold the stated term, or if interested as a party or as having been counsel, any other vice-chancellor or the chancellor may hold such term.(7)

§ 16.

Petition and motion, when presented or made, how adjourned, when to be heard.

In all cases, the petition must be presented or the motion made, on the day it is noticed, if the party can be heard, unless the court otherwise direct.(8) If the chancellor or a vice-chancellor is unable to attend on any regular motion day, in vacation, the case stands over of course, until the next regular motion day, without further notice, or until the first day of a stated or special term, if any intervene.(9) But at term, a preference will be given among those contested, to such as could not have been brought on, on any preceding regular motion day in vacation.(10) If the business so noticed in vacation cannot be finished on any regular motion day, it may be continued from day to day till completed, or adjourned to a subsequent day.(11) If the petition be presented to the chancellor, he may refer it to a vice-

(2) R. 1.
(3) 2 R. S. 176.
(4) ib.
(5) ib.
(6) R 2.
(7) 2 R. S. 177.
(8) R. 5.
(9) R. 4.
(10) R. 5.
(11) R. 3.

chancellor for hearing and decision.(12) But in all cases in which the vice-chancellors have jurisdiction pursuant to the provisions of the statute,(13) they must proceed upon petitions presented to them, and shall possess all the powers and authority of the court, except where different provisions are made by law, subject in all cases to the appellate jurisdiction of the chancellor.(14)

§ 17. How prepared for hearing.

In England, the petition is first left, and affidavit in support or in opposition filed, with the proper officers of the court, and the petition is answered by returning it with the day for hearing. This is setting down the petition. A copy is then served with the order for attendance.(15) Here, the petition is first presented on the day noticed, and if from the press of prior matters or other cause, it cannot come on, it stands over, or is adjourned as before stated. [See § 16; also, post. § 19.]

Brief.

To prepare the counsel for hearing, on special petition or special motion, a brief may be made consisting of such points, observations, information and references to authority, as the case requires. It is indorsed "The Chancellor," or "Vice-Chancellor," before whom to be brought, the words "to move" or "to oppose," according to the annexed notice, affidavit or petition, (or if on motion, it may shortly detail the subject of it.(16)

Affidavit of service.

An affidavit [see § 7] of service of a copy of the petition and notice of motion(17) completes the preparations for hearing, on the part of the petitioner.

§ 18. Defendant's proceedings.

On the part of defendant, he may before hearing:—1. Move for further time:—2. Refer the petition or affidavit for scandal or impertinence:—3. Move to dismiss the petition for want of prosecution, and take advantage of any irregularity.

(12) See R 8. 2 R. S. 169.
(13) 2 R. S 168-9.
(14) 2 R. S. 177.
(15) Grant 242-3. Newl. 150-1.
(16) Grant 243. 246-7.
(17) Vide Bla. 212. In England the affidavit of personal service is filed before the petition can be read—ante. § 11.

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§ 19. Further time.

1. The motion for further time, is on special cause shown, but without previous service of copy of the affidavit or notice of motion.[§ 14] It is ex parte, and made on a regular motion day;(18) or the court may order the petition and motion to stand over to a certain day, and order the benefit of the first notice to be saved. This has been done where the opposing counsel was absent.(19)

§ 20. Exceptions and reference for scandal or impertinence.

2. Exceptions for scandal or impertinence (see §5. 7.) are taken and referred in the same manner, that exceptions are to an answer for insufficiency, in proceedings by bill. And as exceptions to a bill or other pleading or matter pending, for scandal or impertinence, are governed by the same rule, the mode of proceeding will be pointed out, under the proceedings by bill, after appearance by defendant. (see ch. viii.)

§ 21. Dismissal of petitions, motions and costs.

If a petition be not brought on, none appearing in support of it, it will be dismissed on affidavit of service produced, with costs (20) to be taxed; if according to the practice of the court, costs would be awarded against the petitioner upon a decree rendered on the hearing.(21) So if a motion be not made, costs of the adverse party is taxable, and must be paid before the motion can be renewed. But the application for costs by the English practice must be made on the motion day next succeeding that of the original motion.(22) If an uninterested party be served with notice of a motion, he has a right to appear and be entitled to his costs.(23) Costs of a motion are not given, unless mentioned in the notice, and the motion itself is at the peril of costs.(1) And though the effect of the motion be allowed, yet the party may be ordered to pay costs for a deficincy of notice, but to avoid the expense of a taxation for so trifling a sum, a sum certain has been on motion, ordered for costs.(2) Where a motion is refused because made against settled practice, it is always with costs.(3) Costs of motion dismissed are not costs in the cause.(4)

(18) See R. 126. 125. *ante* § 15.
(19) 2 Turn. and Ven. 173. 11 Ves. 600. c. 1. Grant, 247.
(20) 2 Madd. 395. 1. Grant 243.
(21) R. S. p. 3. c. x. s. 1.
(22) 3 Madd. 550. 2. ib. 214. 1 Swanst. 123. Newl. 146. Grant 247. *Sed* v. 9. Price 14.
(23) 1 Jac. and Wal. 377.
(1) 18 Ves. 297.
(2) 4 Bro. C. C. 100.
(3) 2 Ves, and B. 372.
(4) 4 Madd. 226.

Where a party is ordered to pay the costs of any interlocutory proceedings and no time of payment is specified in the order, he must pay them within 20 days after service of a copy of the order and taxed bill, and if he neglect, or refuse to pay within that time, the adverse party on an affidavit of the personal service of such copies, a demand of payment, and that such costs have not been paid, may have an exparte order to commit the delinquent party to prison.(5) The form of the order is that, approved by the chancellor.(6) If the petition is dismissed. or other final decree thereon, a fi. fa., ca. sa. or other execution adapted, may issue.[§ 90]

Interlocutory costs how enforced.

§ 22. Either party, taking advantage of irregularities.

Any irregularity in practice, or defective notice, will be cured by neglect to complain of it in due season, and if either party wish to avail himself of any irregularity, he must make the objection as soon as he has information sufficient to excite enquiry. (7)

§ 23. Petitioner setting aside dismissal, or dismissing his own cause.

On the part of the petitioner, if the petition or motion has not been actually dismissed, but not brought on pursuant to notice, the notice may be renewed; and it is not necessary that new copies should be served of petition affidavit, &c.; but the notice should refer to the copies already served; or if the matter has been dismissed, for want of prosecution, it seems from the analogous case of bills, that the order for dismissal may, under special circumstances, on motion, service of notice, affidavit of merits, accounting for delay, or excusing the neglect, be discharged on costs or other terms in the discretion of the court. (8)

The plaintiff may voluntarily dismiss his petition but in no case (9) without costs to adverse party, if any has appeared, provided the case carries any costs, (1) unless he consent. (2) If discontinued after notice of retainer, the notice of the rule to discontinue (that is, the order for voluntary dismissal) and a tender of the costs should be made. If before appearance (3) but after service of petition and notice of motion, a notice may be given of the

(5) R. 171.
(6) See appx to rules No. 10.
(7) 2 J. Ch. 242. 5. J. Ch. 191. *post* ch. viii.
(8) See 1 Madd. 265. 2 Meriv. 64. 3 Ves. and B. 1. 16. Ves. 127.
(9) 1 Paige, 300. *Sed. vid.* ib. 82.
(1) R. S. p 3. c x t 1. s 1. see 2. J. Ch. 475.
(2) 1 Ves. jr. 141. 1 Cox 23.
(3) *vid.* Eq. Draft. 582.

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discontinuance and that defendant need not appear; otherwise, if he appear he would be entitled to costs. The motion and order to dismiss for want of prosecution, or voluntarily upon payment of costs, is of *course*. (3) But without an order of dismissal the suit remains in court, notwithstanding an agreement between the parties that it shall cease. (4) But the court has stayed proceedings, where parties have entered into an agreement for that purpose.(5) On the day for hearing, the petitioner presents his petition with all affidavits, notice and proof of service, and after reading the same, moves that the prayer thereof be granted. If the adverse party neglect to appear, or if the application be ex parte, in the first case, an order for taking the petition as confessed, and in both cases, as also where all parties appear and argue, such further, interlocutory or final order will be directed as the court under the circumstances think proper.

§ 24. Hearing on presenting petitions &c. orders thereon.

§ 25. Pro confesso and setting aside default.

Any petition may be taken as confessed in the same manner that a judgment by default is entered in the supreme court, according to the practice of courts of equity in other cases.(6) But the defendant on merits, may on motion thoughdecree be enrolled(7) or petition, with affidavit, notice and service, and on terms open the decretal order by default (8) and be admitted to contest the petition.

§ 26. Reference of hearing, and hearing.

Any motion or cause set down for hearing before the chancellor may by him be referred to a vice-chancellor (9) or *vice versa* on special application to the chancellor. (10) (ch. I.§ 5. 7.) When the petition or motion comes on to be heard, it is supported by the affidavits, admissions of opposing party, official certificates, orders or decrees of court, as the case may be.(11)

§ 27. Hearing preparing and settling orders.

Whether the motion on hearing be granted or refused, the order pronounced will be drawn up by the prevailing party. The practice in case of special orders and decrees, of an exparte nature, has been, to draw the or-

(3) Newl. 144, ante, § 14 post § 28, 29.
(4) 1 Jac. and Walk. 345.
(5) ib. 337.
(6) R. S. p 3. c 5. t 3. s 82. see pro confesso, ch. viii. *post.*
(7) 3. J. Ch. 415.
(8) See R. 126. 3 J. Ch. 415. 2 J. Ch. 425.
(9) 2 R. S. 168-9. subject to appeal *post* § 62. 66.
(10) 2 R. S. 178. s 63.
(11) Newl. 149. 151.

der in conformity with the prayer of the petition or object of the motion, under such modifications as were specially directed by the chancellor. Being thus prepared, it was approved by him, and delivered to the attending register, &c. to enter; or if the order was settled on any day when the latter was not present, the chancellor would mark his initials, as authority for him to enter it. In some instances the practice has been, and in all cases, it is recommended that the solicitor or counsel prepare the order sought, and present it with the petition, or at the time of the motion. Any slight alterations then directed might be made at once, and the order forthwith entered. In contested applications, where a special or decretal order was pronounced, the written opinion of the court furnished the principle for drawing the decree, but the leading heads and points, of special directions were minuted by the attending officer, or sometimes prepared by the chancellor. The solicitor or counsel interested, also took down a memorandum of the same, and sometimes compared his own notes with the minutes, for the sake of correctness. He then drafted the orders, served a copy on the opposite solicitor or submitted the original to him or his counsel, and if assented to, his approval was signified, and the draft passed to the register, &c. to enter. If not agreed to, a notice was served of moving the chancellor to settle and approve the same. The opposing counsel or solicitor might draw an order agreeably to his own views, or such parts thereof, as he pleased by way of amendment or addition to the draft proposed. On the day noticed, the drafts were submitted or discussed, and the chancellor, then, or on a subsequent examination of the papers, made such alterations as he deemed proper, and delivered the order approved to the solicitor interested, or handed it over to the register, &c. The register or assistant-register had nothing to do with drawing the order or settling the draft. But if he was specially requested by the solicitor or party interested, he drew the order from his minutes of the special directions of the court, and the papers in the cause; showed it to the party, and opposite counsel, or delivered it to the former, who would submit it to the latter, and if approved, return it to the register, &c. to enter. If not agreed to, the ultimate resort was still to the chancellor. This mode of settling a special order or decree, is preferable to that by

CHAP. II. the English practice of settling minutes and passing the order with the registrar, when the final appeal must be in case of insuperable difficulty to the lord chancellor, &c. The practice here may, and ought to be further simplified, and it is therefore strongly recommended, that in all possible cases parties come to the hearing prepared with draft, orders or decrees, or at least a sketch of the minutes thereof, containing the substance of the order or decree sought. The draft or minutes being read at the hearing may be submitted, and if any alterations or additional matter be directed, then, or when the order is pronounced, the solicitor or counsel will note them on the draft, and in presence of the opposite counsel read it as amended, and if approved, hand it over at once to the attending register, assistant-register, or clerk in court. This course will effectually prevent any misunderstanding resulting from delay, and save the time of the court and parties, usually required in settling disputed orders. If the minutes of the decree submitted and approved are directed to be entered, the decree must be made in conformity thereto. But if the draft decree be prepared, and settled as recommended, it will be forthwith entered.

2 *Common orders* or *of course*, have been drawn and entered by the Register &c. a precipe for the same by way of general direction, and authority being filed for that purpose. The revised statutes(6) have virtually abolished precipes, by disallowing any fee for drawing or filing them. And by a rule of court, which will be presently referred to, those orders are to be entered in a common rule book, to be kept for that purpose. In this respect the practice approximates to that of the supreme court. But as it seems to be the duty (Ch I. § 12) as well as privilege of the officer to enter such order, but at the instance and peril of the party or his solicitor, a draft order, a written request as practiced in the conrt of errors, [*post.* § 76.] or a resort to the precipe, may be necessary.

§ 28. Orders.

Orders sought on hearing upon special application by petition or motion, as well as in proceedings by bill, may be peremptory and final in the first instance, or interlocutory and decretal: 1st, for a *reference* to a master to ascertain and report the truth of the facts set forth in the petition, or for enquiry as to parties, guardians, committees, receivers, sureties, property; or 2d for a *feigned issue*

(6) 2 R. S. 651.

or other mode of settling facts, or a special case on a question of law. The subject of references and issues will follow, a brief consideration of the variety, mode of entry and service of orders interlocutory and decretal.(1)

Interlocutory and decretal. Common or of course.

All *decrees* on hearing of a cause are (decretal) *orders* but all orders are not decrees, some being common : or if decrees, not final, many being interlocutory. A final decree is when all the material facts are ascertained so that the court can decide on the merits,(2) is equivalent to a judgment at law,(3) and when docketed may now form the same lien.(4) Interlocutory orders are upon applications between the commencement and final decree, and embrace, 1. common orders or of course which are made upon petitions or motions of course[§ 14] and entered in term or vacation, being such, to which by the rules and practice of the court, a party is entitled of course without showing special cause, and which (as well as orders between parties by consent in writing signed by them, their solicitors or counsel and filed, are entered with the register, assistant register or proper clerk in the common rule book kept in his office, at the instance of the party or his solicitor, at the peril of the party taking such order, the day on which the order is made being noted in the entry of it.(6) Special orders are orders on special application,(7) by motion or petition on affidavit notice and service: all orders not of course being special. Orders as well special as in some instances, common or of course, are absolute in the first instance, or conditional, which are termed orders *nisi*. All orders are in their nature absolute, *unless* (nisi) good cause be shown by a limited time.(8) A special order nisi or conditional is on petition, or motion, affidavit or certificate without previous service or notice. Copy of the order is then served, service proved, and unless good cause be shown, made absolute.(9)[See § 12.] A common order nisi, whether founded on affidavit, certificate, report, &c. requires no subsequent order to render it absolute.(10) All rules to take

§ 29. Special.

§ 30. Nisi causa, and absolute

(1) See Grant 243-258. Blake205-7 213. Newl. 168-175. 2 Harr. 139. 141. Eq. Draft, 572.
(2) 17 J. 548.
(3) 4 J. Ch. 619. 5 J. Ch. 555.
(4) *post*, § 82.
(6) R. 46.
(7) R. 46.
(8) 1. Grant, 248-9. Newl. 168-9.
(9) See R. 114. 89. Eq. Draft, 603-4 an order nisi obtained on affidavit, need not refer to it. Newl. 169.
(10) But in England, an order for instance to confirm a report *nisi* always precedes the order confirming the report "absolute." Grant 257.

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effect nisi, &c. unless otherwise specially directed are rules of eight days, and the time on all rules, orders, notices and proceedings, where a time is given or stated, must, unless otherwise expressly provided, be deemed and taken to be one day inclusive and one day exclusive; but if the time expire on Sunday the whole of the succeeding day will be included.(11)

Some orders, apparently absolute, are in some sense conditional, as they cannot be acted upon without a subsequent order; as where a sergeant-at-arms is ordered to go against a party, *unless* he bring in his examination by a limited time: on default, a fresh order must be obtained to have the party commited, upon producing the master's certificate of the party's examination not being brought in, and so in other cases of like nature.(12)

§ 31. By consent.

Beside the orders by consent between the parties, signed by them or their solicitors' or counsel, filed and entered as before directed; it is further ruled (13) that no private agreement or consent between the parties in respect to the proceedings in a cause can be alleged or suggested by either against the other, unless the same shall have been reduced to the form of an order by consent and entered in the book of common orders, or unless the evidence thereof shall be in writing subscribed by the party against whom it is alleged or suggested, or by his solicitor or counsel.(14)

These consents save time and expense, and if more frequently adopted, would sensibly diminish the accumulating pressure of business before the court. In amicable suits, and in all cases where it is not absolutely necessary to discuss the merits of the application, orders or decrees by consent are to be recommended. But they should be entered into with a proper degree of circumspection, as they cannot, as a general rule, be set aside on motion, rehearing or appeal, or varied but by consent.(15)

(11) R. 122. See 5 Cowen 420.
(12) Grant 249. Newl. 169-170.
(13) R. 121.
(14) R. 121.
(15) An order that a cause stand over with leave to amend by add-

In cases of consent petitions, in England it is held to be necessary that the consenting counsel have a copy of the petition, if not attend in court on the hearing and there consent; but that sometimes the court is satisfied, in his absence, by the counsel applicant stating that the opposite counsel consents.(12) And that, as infants cannot consent, it is usual for counsel for them, to appear and not oppose leaving it to the court to direct, and so no consent is given.(13)

§ 32. Caption and form.

The caption of orders and decrees must be in the form prescribed by the rules of court(14) and of the statute, being entitled as made, before the chancellor or a vice-chancellor, according to the fact.(15)

Orders granted on petitions, or relating thereto, must refer to such petitions by the names and descriptions of the petitioners, and the date of the petitions if the same be dated, without reciting or setting forth the tenor or substance thereof unnecessarily,(16) and must be paged, marked and indorsed, [§ 9] with the words "before the chancellor," or "before the vice-chancellor," as the case may be.

§ 33 Entering and when, how & where.

When the order is drawn, settled and passed by, or under the directions of the court, or by the attending register, assistant register or clerk, by request of parties, it is entered as of the day when pronounced. All petitions, affidavits or other papers, on which the order is founded, being previously, or at the same time filed. If an order be lost before entering it, it may be redrawn, and in this case, as well as in many others, may, on motion of course if the delay is recent, or on special motion and notice if of long standing, be ordered to be entered *nunc pro tunc*.(17) So where a party dies after argument and before judgment, the decree may be entered so as to have relation back to the day of final hearing.(18)

ing parties, is in its nature an order by consent, and cannot be appealed from. 2 Cox. 156. See post § 65.

(12) 1 Grant 255.

(13) 1 Grant 256.

(14) R. 10. 98.

(15) 2 R. S. 178. § 58.

(16) R. 123.

(17) Harr. 514, 515. 3 Atk. 521. 1 Dick, 129. c. 1 Grant 256.

(18) 4 J. Ch. 334 See Seabring, v. Mersereau, in Error.

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Common orders are entered as before directed; but all orders by the special directions of the court are entered in the record of the minutes.(19) All orders and decrees, made by the vice-chancellors at any time, or by the chancellor during term, must be entered with the register, assistant or clerk, where the court is held at the time they are made; if made by the chancellor in vacation, unless otherwise specially directed, they may be entered with the register or assistant register, as may be convenient; but the captions of such orders and decrees must always state truly the place where the court was held when the same were made,(20) and entitled as made before the chancellor or vice-chancellor, according to the fact.(21) All orders in a cause must be entered with the clerk of the court, or with the register or assistant register, officiating as clerk of the court which entertains jurisdiction of such cause, in the same manner as if made by the chancellor.(23)

§ 34. Filing papers

Petitions, bills and subsequent papers, brought before the chancellor, are filed with the register or assistant register. But if the cause be referred by him to a vice-chancellor for decision, papers during the pendency before the latter may be filed with the clerk of his circuit.(24)

All petitions and bills relating to a cause or matter within the jurisdiction of a vice-chancellor, and which petitions must, though addressed to the chancellor, be presented to a vice-chancellor, are to be filed with the clerk of the court residing in such circuit, or if presented to the vice-chancellor of the third circuit, be filed with the register; if of the first, with the assistant register.(25) In all other cases than those last mentioned, all petitions and bills are to be filed in the office of the register or assistant, who also perform all the duties heretofore attached to the office of the clerk of the court of chancery.(26)

(19) R. 46.
(20) R 98.
(21) R 10. 98. 2 R. S. 178.
(23) R S ib. s 58.
(24) R 8.
(25) 2 R S 177. s 54.
(26) R S ib. s 55.

Answers, pleas, demurrers, replications and other pleadings and proceedings in any cause which may, according to the statute, be heard by a vice chancellor, must be filed in the office of register, assistant register or clerk, with whom the petition or bill in the cause was filed: in other cases such pleadings and proceedings may be filed in the office of the register, assistant register or any clerk, or in such of them as the chancellor by general rules directs.(22) The register and assistant register must enter and keep papers in causes before the chancellor separately from those before the vice-chancellor.(23)

§ 35. Service of orders.

After the order is entered, if it require service, a certified copy for that purpose may be taken from the office. The service is by a copy of either the original or office copy, as the case may be, showing the original order, or office copy at the time of service.(1) The original must be shown upon the service of copy of an order unless it be dispensed with.(2) As many copies are made for service as there are parties to be served.(3) In England all orders of course are served, excepting such as are merely for process or a commission;(4) but here, notice thereof is all that is usually required, and in some instances, especially where a party has not appeared, no service of such order by copy or notice is necessary. [See § 12. 13] But there are many cases not of contempt, where if an order upon motion of course be not served, an intermediate step of the adverse party would be good.(5)

Orders made on hearing both parties, do not require service.(6) But all orders, the breach of which will bring a party into contempt, and render him liable to an attachment, and other process must be served personally on the party, unless personal service be dispensed with, as orders for payment of money or performance of some other act.(7)

An order of commitment for the non-payment into court being "that the party do stand committed," if he

(22) R S ib. s 56.
(23) R 7.
(1) 1 Grant 250. 253-5.
(2) 19 Ves. 380. Coop. 282.
(3) Grant 250.
(4) ib. 256.
(5) 1 Jac. and Walk. 287.
(6) Mos. 202.
(7) Grant 256.

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be present when the order is pronounced he is a prisoner instantly.(8) Personal service of an order as a foundation for process of contempt for disobeying it, has been dispensed with, or some other, on special motion substituted, where the former was impracticable;(9) where a party was in court, and must have had notice of the decree, as to transfer stock, &c.(10) had absconded to avoid the decree;(11) had been called for several times and could not be found;(12) or was of singularly ferocious character, service of order of commitment was made good service by leaving it at his dwelling house;(13) where the first order is in effect nisi, a subsequent or fresh order for commitment must be obtained. [See § 30.] A motion for commitment for breach of a former order must be supported by affidavit of service, though recited in a subsequent order obtained by the party against whom the order was made.(14)

REFERENCE AND ISSUE AT LAW.

§ 36. Reference, orders for, in what stages, order of course or special, how framed, at it contains.

1. *Reference;* If the order is for reference, a certified copy thereof is obtained from the office, served by entering it with the master designated in the order or standing rule hereafter mentioned.

Orders for reference may be upon every petition; and in the very first stage of its proceedings, as well as those by bill, as for scandal or impertinence [see § 20 and *post* ch. viii.] So in various stages of the suit (15) as after pro confesso for non appearance, on exception to answer, on special reference before hearing, or after a prior examination and hearing. These orders are, in certain cases which will be pointed out hereafter, of *course*, in

(8) 1 Atk. 55. There are cases where, though the language of the order is as in the text, yet a fresh order must be had, as upon a four day order to bring in books before master, in Eng. 14 Ves. 180.

(9) Grant 256-8.

(10) 12 Ves. 202. vid. 5 J. Ch. 555.

(11) 12 Ves. 203. 1 Jac. & Walk. 643.

(12) 4 Madd. 462.

(13) 2 Dick. 477. 1 Grant 257-8. So also, in England, where a party avoided service, service was made good on his solicitor, there being no clerk of the party in court. 12 Ves. 2.

(14) 3 Atk. 619. The principle of substituted service is recognized in this state in the case of —— Ideley, who attempted to elude the service of an order, in relation to the custody of an infant. The case is not reported, but may be seen in the records of the assistant register's office.

(15) vid. Bla. 220. 221-7.

all others *special.* The *order* (1) should be cautiously framed under the advice of counsel when special, to meet the case, for the master must be guided by its specific directions, except when governed by the standing rules.(2) The defendant may be directed to produce on oath, all books, papers, &c. in his custody or power, and be examined on oath on such interrogatories as the master may direct relative to transactions set forth in the pleadings.(3)

The subject of references, though not foreign to the design of the present work, is yet so much within the particular province of the masters who are usually competent to direct proceedings before them, that I shall confine myself to some alterations and provisions recently adopted, and refer for illustration to the books upon this department of the practice.

§ 37. Before what Master; 1, on orders of course; 2, special or decretal.

An order for a reference when entered of course must be executed by a master residing in the same county with the solicitor who obtained the order, unless a different master is agreed upon by the parties; or, if there is no master in the same county legally competent, the order may be executed by a master in an adjoining county. If the reference be by a special order or decree of the court, it may be made to any particular master by name, or to any master in a particular county or place in the discretion of the court, and if no particular master or county or place be named or specified in the order or decree, it must be executed by an injunction master or a taxing master only, unless some other master is agreed upon by the parties.(4)

§38. How speeded.

If the party entitled to prosecute such decree or order of reference do not procure and serve the summons, (mentioned in the next rule,) within 30 days after the decree or order is entered, any other party or person interested in the matter of the reference will be at liberty to apply to the court by motion or petition to expedite the prosecution of the decree or order.(5)

(1) See directions in 2 J. Ch. 595. 3 J. Ch. 587. 4 J. Ch. 445. See further, Bla. 220-225-7. 55. app.

(2) He may now for instance proceed de die in diam, &c. sed. vid. Bla. 226. Hoff. Mr. 5. 6.

(3) 2 J. Ch. 513. See decretal order to produce books, &c. and directing examination of all parties, Eq. Draft 593. 613-14. 628. Sed. Hoff. Mr. 14. 17. 18. 31.

(4) R. 99. See Masters, ch. 1. 2.

(5) R. 101.

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§ 39. Masters duty.

§ 40. Summons and service, & for what time.

Where a matter is referred to a master to examine and report thereon, on bringing the order or decree into his office he must assign a day and place for hearing the parties, and give to the party bringing in such decree or order a *summons* for the adverse party to attend at the day and place so appointed. The summons must be served on the adverse party, or his solicitor, such time pevious to the day appointed for hearing, as the master may deem reasonable, and direct; taking into consideration the nature of the matters to be examined, and the residence of the parties. But the time of service, unless otherwise ordered by the court, must not be less than two days, where the solicitor of the adverse party resides in the city or town where the hearing is to take place; not less than four days where he resides elsewhere; and not less than two days in addition for every fifty miles from the residence of such solicitor to the place of hearing.(6)

§ 41. How reference speeded after summons.

After the proceedings have been commenced by the service of a summons to attend before the master, if the party entitled to prosecute such decree or order do not proceed with due diligence, the master will be at liberty, upon the application of any other person interested, either as a party to the suit, or as coming in to prove his debt, or establish a claim under the decree or order, to commit to him the prosecution of the reference.(7)

§ 42. Return of summons and regulation of proceedings.

At the time and place appointed in the summons for the hearing of the parties the master must proceed to regulate, as far as may be, the manner of its execution; as for example, to state what parties are entitled to attend future proceedings, direct the necessary advertisements, point out which of the several proceedings may properly be going on pari passu, and as to what particular matters, interrogatories for the examination of the parties appear to be necessary, and whether the matters requiring evidence shall be proved by affidavit or by examination of witnesses, and in the latter case, if necessary, issue his certificate for a commission. If he think it expedient he may then, or upon any subsequent attendence, and from time to time as circumstances may require, fix the time within, or at which, any proceedings before him shall be had, and may proceed de die in diem, or by adjournment from time to time as he may think proper.(8)

§ 43. Certificate for commission to examine witness, and further regulations.

(6) R. 100. as to summons and service—See further the practice thereon. Hoff. Mr. 1, 2, 3. 9. and appx. No. 1. affidavit of serving, ib. No. 2. Bla. 229.

(7) R. 101.

(8) R. 102.

§ 44. Production of books, &c.

Where by any decree or order(9) of the court books, papers or writings are directed to be produced before the master, for the purposes of such decree or order, it shall be in the discretion of the master to determine what books, papers, or writings are to be produced, and when and for how long they are to be left in his office; or in case he shall not deem it necessary that they should be left or deposited in his office, then he may give directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he shall deem expedient.(10)

§ 45. Ex parte and opening for review.

Where some or one, but not all of the parties do attend the master at the time and place appointed, whether the same is fixed by the master personally, or upon a summons or warrant, the master shall be at liberty to proceed ex parte if he thinks it expedient so to do, considering the nature of the case, and if he has proceeded ex parte, such proceeding shall not in any manner be reviewed by him, unless upon a special application to him for that purpose by the party who was absent, the master shall be satisfied such party was not guilty of wilful delay or negligence, and then only upon payment of all costs occasioned by his non-attendance; such costs to be certified by the master at the time, and paid by the party or his solicitor before he shall be permitted to proceed on the warrant to review. And every summons or warrant to attend before a master shall be considered peremptory.(11)

§ 46. Viva voce or interrogatory examination.

The master will be at liberty to examine any witness or party, or any creditor or other person coming in to claim before him, either upon written interrogatories or viva voce, or in both modes as the nature of the case may appear to him to require; the examination or evi

(9) See order for production of books, &c. of a corporation, and examination of its officers, Eq. Dr. 628. See further ib. 613, 14. Hoff. Mr. appx. No. 3.

(10) R. 103. Under the English rule 3 apl. 1828, which is similar to R. 103, it has been decided, that a party ordered to produce books, &c. before the master is bound to leave them, if he think fit so to direct. 1 Simons, 388. As to production of books and papers, see 4 J.Ch. 381. 2 J. Ch. 513. 1 Hopk. 424. Bla. 240-1. Hoff. Mr. 9-13. 7. 27. 31, and *forms*. Bla. 51, appx. Hoff. Mr. appx. No. 3, 4, 5, 6. Eq. Draft, 593. As to the evidence or weight due, to books, &c. produced, see Hoff. Mr. 11. 13. 81. 83. and authorities.

(11) R. 104.

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dence being taken down at the time by the master or his clerk in his presence, and preserved, in order that the same may be used by the court if necessary.(12)

§ 47. Reference, on what principles conducted.

The general principles upon which an examination may be conducted, are prescribed in the leading case upon the subject,(13) and are analagous to those prescribed by decisions, and adopted or modified by the standing rules in relation to examinations before a vice-chancellor, examiner or commissioner: the proceedings, in which. as well as in a reference upon an interlocutory decree after an examination, or for the examination of a party by order on motion or petition, or before hearing upon exceptions to an answer, or to take proof to compute, and for sale on taking bill pro confesso in a suit by bill, will be particularized in the regular order of proceeding. The mode and manner of preparing, serving, settling, filing interrogatories, when the examination is not oral; and of the proceedings whether before a master or the above named officers, as adapted also to the character of the suit and nature of this reference, will also be reserved, with the exception of a few other general rules.(1)

§ 48. Sub. for witnesses.

Process of subpœna to compel the attendance of witnesses before a master (as well as before a vice-chancellor, examiner or commissioner,) may issue of course, the time and place of attendance must be specified in the writ, and witnesses may be punished for contempt, if they fail to attend and submit to an examination.(2)

§ 49. Exceptions for scandal, impertinence or insufficiency.

If a party wishes to complain of any matter introduced into any state of facts, affidavit, or other proceeding before the master, on the ground that it is scandalous or impertinent, or that any examination of a party before him is insufficient, such party will be at liberty to file exceptions thereto with the master; and without any order of reference he may take out a warrant for the master to examine the matter upon such exceptions; and

(12) R. 105.
(13) Remsen vs. Remsen, 2 J. Ch. 495; as to which, see Blake 221-2. 228. 230. 247. 263-4. See also, 1 John. Dig. 363, &c. Hoff. Mr. 471. 45.
(1) Vid. Blake 220 to 235. & other references, 285. 303. 327, and Hoff. Mr.
(2) R. 76.

the master will have authority to expunge any such matter which he shall find to be scandalous or impertinent. And in deciding on the sufficieney or insufficiency of the examination of a party, or of any answer to the bill, the master must always take into consideration the relevancy or materiality of the statement or question referred to in the exception. On exception to the master's report, or his certificate of the sufficiency or insufficiency of an examination, the parties must be confined to the objections taken before the master.(3)

Do. as to report.

§ 50. Accounting, and exam. party.

All parties accounting before a master must bring in their accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in, will be at liberty to examine the accounting party upon interrogatories, as the master may direct.(4)

§ 51. Separate reports.

In all matters referred to a master, he will be at liberty upon the application of any party interested to make a separate report or reports from time to time as he shall deem expedient, the costs of such separate reports to be in the discretion of the court. And where the master shall make a separate report of debts or legacies, he will be at liberty to make such certificate as he thinks fit with respect to the state of the assets; and any person interested will thereupon be at liberty to apply to the court as he shall be advised.(5)

§ 52. Dr. report, copies, settling, filing.

When the master has prepared the draft of his report he must deliver copies thereof to such of the parties as apply for the same; assign a time and place for the parties to bring in objections, and for settling the draft, and issue his warrant for that purpose. No summons to see the draft of the report and take copies thereof is necessary. On the return of the warrant, or on such other day as may then be assigned by the master for that purpose, if objections are filed by either party, he may proceed to hear the parties on such objections; must settle and sign his report and cause it to be filed in the proper office within 20 days after the argument on

(3) R. 106. 3 J. Ch. 78. 7 J. Ch. 137.
(4) R. 107.
(5) R. 108.

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such objections is closed. If no objections are made to the draft, he must sign his report and file it in the proper office within 10 days after the time assigned for bringing in objections.(6)

§ 53. Order of confirmation of course nisi.

After the report is filed, either party may have an order of course to confirm the same, unless cause to the contrary thereof be shown in 8 days; and if no exceptions are filed and served within that time the order will become absolute of course, without notice or further order; or either party may file exceptions, and have an order of course to confirm the report, so far as the same is not excepted to, and with the like effect.(7)

2 FEIGNED ISSUE, SPECIAL CASE, &c.

§ 54. Modes of trying fact, or settling law.

The mode of ascertaining facts may be by reference already considered, or as will hereafter (ch. ix.) appear under proceedings by bill, by examination before a vice-chancellor, examiner or commissioner; by arbitration with consent; by the court itself; by bill filed; by action directed or feigned issue awarded. On questions of law a special case, in discretion of the court,(1) may be made, settled and referred to a court of law, and upon return of judge's certificate, if the chancellor be dissatisfied, or if the point be so important as to render it desirable that the opinion of another court be obtained, he may direct it to be sent accordingly. In one instance in England, the case was sent back to the same court to be reviewed.(2) It is framed by or under the direction of the court. The facts to be stated in the case, may be stated in the order by the court, without reference, or referred to a master to settle. The case is signed by the counsel on each side. If one refuse, he waives its benefit. In England it has been sometimes directed, in order to save expense, to be argued before two common law judges at their chambers instead of the whole

(6) R. 109.
(7) R 110.
(1) 6 Madd. 273.
(2) See one Arcbb. Pr. 319. Bls. 387-8. Newl. Pr. 355-6, and authorities cited. 17 Ves. 72. 2 Madd. 363. 367. 3 T. R. 500. 529. 4 T. R. 570. Cowp. 31. and form of case and certificate, 6 T. R. 307.

court.(3) Here it has been usually directed to the supreme court, and an issue of fact to the circuit, but might be to the superior court of the city of New-York, or to the judges of courts of common pleas.

Reference. Commission for examination.

In ordinary cases, *facts* may be ascertained by reference or examination. The court may by order direct a reference or commission to take a wife's consent to waive her equity by examining her privately and apart from her husband, to ascertain to what uses she is willing and desirous that the money be paid, or other disposition of funds in which she is interested.(4)

Arbitration.

The court may with the consent of parties refer the subject in controversy to arbitrators with special directions,(5) the same being in the nature of a report, liable to exceptions, or to be confirmed, &c.;(6) or direct a cross bill,(7) or bill to bring up all things necessary to a decree,(8) or order a suit to be brought at law,(9) for example to try usury on a contract,(10) and mean time stay proceedings, or award a feigned issue.

Trial by the court.

An issue may be directed on a motion or petition. But in these cases, as by bill, where the truth of the facts can be satisfactorily ascertained by the court, without the aid of a jury, it is its duty to decide as to the facts, and not subject the parties to the expense and delay of a trial at law.(11) The court may ascertain and decide upon facts without the intervention of a jury, except in certain matrimonial cases, or on issue devisavit vel non.(12)

§ 55. Feigned issue when awarded.

In case of adultery denied by the answer,(13) and all issues upon the legality of a marriage (except when sought to be annulled on the ground of the physical incapacity of one of the parties,) must be tried by a jury, and the chancellor must accordingly award a feigned issue, and if the legitimacy of any children of the wife is questioned, an issue thereon must

(3) 1 Dick. 73. 2 Dick. 474. 1 Jac. & Walk. 426. Newl. Pr. 355. c. 3 Atk. 735.

(4) See form of order that commission issue. Clancey's rights of women, appx. No. iii. p 627. See another form where wife is abroad. Eq. Draft. 605. 606. Form of comm'n, Clancy ib. No. iv. of examination. ib. No. vi. p. 629. and return to the comm'n. ib. No. v. p 628–9.

(5) See order, Eq. Draft 632-5

(6) 1 Grant 214. c. See 1 Bro. Ch. Ca. 478. vid. 2 R. S. 554. § 22. 540.

(7) 7 J. Ch. 250.

(8) vid. Bla. 373-4. Hinde 72.

(9) Bla. 374. 377. See further Eq. Draft. 624-6.

(10) ib. 2 Doug. 735. c.

(11) 6 J. Ch. 255. 1 J. Ch. 436.

(12) 5 J. Ch. 118. 1 Paige 18, 19. Bla. 374. Archbold's Pr. 315.

(13) 2 R. S. 145. § 40-1. R. 167.

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be awarded and tried at the same time the feigned issue is.(13) An issue may be awarded to try a material fact, particularly in relation to title to lands, or to try title to chattels, &c.(14) to try if a person be heir at law; the sanity of a testator,(15) due execution of wills; fact of partnership;(16) alleged payment;(17) or on quantum damnificatus,(18) for injuries to property; where an equivilent in damages is sought in lieu of specific performance, or apportioned on relief against the penalty, or forfeiture in nature of a penalty of a contract forfeited;(19) or a reference instead of such issue and for the like purpose, or for assessment.(20) But the court, except in very special cases, will not sustain a bill brought for assessment of damages for breach of agreement.(21) An issue ought not to be directed to try a matter not fully put in issue in the cause, but the plaintiff may amend his bill so as to put in issue the matter intended to be tried;(22) and as the evidence will be confined to the specific charge put in issue,(1) great care should be taken in framing it. In directing an issue, the court will never order the examination of persons at the trial, who could not by the rules of courts of law be examined, except sometimes in cases where the facts in dispute rest in the knowledge of the plaintiff and defendant.(2)

(13) 2 R. S. 175. § 45. R. 167.— See as to legitimacy, 2 R. S. 145. R. 169.

(14) See Archbold Pr. 315, and proceedings, Bla. 373 to 388 — See also, 1 Hopk. 416.436 5 Cowen 714-15. 719. 1 Russ. 301.

(15) 1 Hopk. 408.

(16) vid. Bla. 373-5. See 2. R. S. 66. § 57.

(17) 9 J. 450.

(18) Vid. Bla. 373-5. form of order on issue on quantum damnificatus, ib. 377. vid. 1 J. Ch. 151. 1 Cowen 713. Order in case of adultery, Bla. 379. See order by consent to try if an outstanding mortgage had been paid. 1 Paige 18.

(19) 17 J. 357. 365-8, in error. S. C. 2 J. Ch. 526. 19 J. 513. when no relief; where damages are stipulated, but then they are apportioned, 17 J. 369. As to damages in lieu of specific performance, vid. 2 Wheat. 303. 4 J. Ch. 228. 559.

(20) 1 Cowen 713. 2 Wheat. 303. vid. auths. obove.

(21) Vid. 5 J. Ch. 193. 4 J. Ch. 559.

(22) 4 Bro. P. C. 640.

(1) 6 J. Ch. 347.

(2) Buck 234. In 1 Ves. & B. 374. the court would not give leave for each party to examine the other, unless by consent.

It is made a question in 2 Haywood, (N. C. Rep. 98.) whether an answer denying the bill could be given in evidence at all to the jury, for defendant.

How settled, tried, & new trial.

The form of issue is settled under direction of the court. The declaration and plea in the feigned action are prepared and interchanged, the nisi prius record made up, and the trial and proceedings conducted as in other cases;(4) except, that after the issue is made up, it has been held, that a motion for a special jury must be made to this court(5) and that if a trial at bar is desirable, this court might express an intimation to that effect to the court at law.(6) The applicant will be limited to some precise time within which the trial must be had,(7) and if the plaintiff do not go to trial, the course would be, to move that the issue be taken *pro confesso* against him,(8) or he may be merely ordered to try at the next court, or in default that it be so taken.(9) But an application may be made on sufficient ground, as the probable absence,(10) or sudden indisposition of counsel,(11) for postponing the trial. A defendant neglecting to name an attorney to try the issue, was ordered to do so in four days, or the issue taken as tried, and verdict for plaintiff.(12) After trial of the issue, or of an action directed, the postea and judge's certificate, with the venire, minutes of trial signed by the clerk of the circuit, and annexed to the nisi prius record, are (after the cause is again noticed for hearing in chancery, and brought on for further directions, or upon the equity reserved) produced and filed, and a decree final or otherwise on the hearing pronounced.(13)

New trial.

It has been supposed that the supreme court might grant a new trial of a feigned issue on affidavit of newly discovered evidence.(14) The object however of the issue is to satisfy the conscience of the court directing it, and the application must therefore be to this court. But when a bill is retained, with leave for the plaintiff to bring an action to establish his right, the object is not for that purpose, and the plaintiff, if a verdict be against him, must apply to the court where the cause was tried;(15)

(4) See 1 Archb. Pr. 315, 316. 127. Newl. 348-354. Blake 374-383.
(5) 2 P. W. 68. Wy. Pr. R. 264. Newl. 352.
(6) See 2 Madd. Pr. 478. 3 Atk. 542.
(7) 2 Ch. Rep. 124.
(8) 6 Price 100.
(9) 4 Madd. 255.
(10) 1 Jac. and Walk. 225.
(11) 1 Caines 152.
(12) 1 Ves 28. 2 Atk. 378. 2 Dick. 571.
(13) Postea, Judges certificate, &c. Bla. 384. 385. 52. appx. 377. see 1 Arch. Pr. 317-18.
(14) 1 J. Ch. 402.
(15) Coop. 96. 2 Dick. 576. 2 Ross 178.

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and in either case, if an inquest be improperly taken, relief must also be sought there.(16) Though it is the most usual course to award a second trial in cases touching the inheritance where the verdict is in favor of the will and against the heir at law;(17) and though the court may award new trials until it is perfectly satisfied with the verdict,(18) yet in the former case it rests entirely in the discretion of the court according to the circumstances and testimony in the cause;(19) and in no case on a mere question of fact ought the court to grant a new trial, unless dissatisfied with the finding of the jury, or have some reason to believe injustice has been done.(20) A new trial ought to be applied for at the next term after return of nisi prius record and certificate, but might, it has been held, be moved and granted at the final hearing on the equity reserved.(21) Where a feigned issue has been awarded and tried, if either party wish to apply to this court for a new trial on the ground of any erroneous decision or misdirection of the judge before whom the issue was tried, or that the verdict was against the weight of evidence, a case must be made up and settled in the manner prescribed by the rules of the supreme court in relation to causes pending in that court.(22)

5. OPENING DECREES, AND REHEARING.

§ 56. Orders and decrees, opening, setting aside by motion or petitions, rehearing and bill of review, appeal, &c.

Interlocutory orders or decrees entered, may be opened, altered, set aside or discharged on good cause, and by special direction of the court, upon such terms as may be deemed just and proper;(1) orders ex parte or on motion of course may be discharged, and a party, though in contempt for not obeying an order, may move to discharge it.(2) The court will set aside any order or decree obtained by default or otherwise upon terms.(3) And though enrolled, it has been set aside on motion and affidavit of merits and excuse, upon payment of costs, the

(16) 1 J. Ch. 487.
(17) 5 J. Ch. 148.
(18) 1 Paige, 18. 19.
(19) 5 J. Ch. 148.
(20) 1 Paige 18, 19, vid. further Bla. 374 c 2 Madd. 364, 367. 9 J. 450. 6 J. Ch. 255. as to what cases a new trial—See 1 Arch. Pr. 317, 318. Where the conduct of the jury was such as to satisfy the court that the verdict on an issue was not the result of sufficient consideration, a new trial granted. 1 Jac. 91.
(21) 5 J. Ch. 148.
(22) R. 140.
(1) Vid. R. 126. 4 J. Ch. 35. 3 J. Ch. 415. 1 J. Ch. 211. Bla. 2.
(2) Mos. 71. 258. c. 1 Grant 256.
(3) R. 126.

complainant having been previously served with notice of the motion and copies of the affidavits on which it was made.(4) It had been decided that a regular decree on the merits could not be set aside on *motion*,(5) nor an order made upon further directions being a decretal order(6) but that a decree or order might by *petition* be set aside for surprise and irregularity(7) or *rectified* on petition(8) or motion in an obvious error or mistake.(9) Where an order for confirming a master's report was regular, it will not be vacated to allow the defendant to except to the report when he purposely kept back his objections at the time, and did not state them to the master, though he had full knowledge of the facts which formed the ground of his exception.(10) If it be too late to amend a decree, the remedy may sometimes be by rehearing, if applied for in season.(11) And though an order may be discharged by motion or petition on proper ground, yet the most regular course would be to discuss the merits of the order on a rehearing.(12) Where a motion on some interlocutory matter in a cause has been once heard and decided, it cannot be repeated unless on a new ground.(13) A decree entered by consent of the solicitors or counsel cannot be set aside on motion,(14) reheard or appealed from;(15) the relief may in case of fraud or collusion be sought by original bill;(16) but it is held that though an order by consent must be got rid of by consent only, yet if the party take proceedings inconsistent with the order, he waives his right to insist on the rule.(17) It will appear in the proceedings by bill, in what way a decree or decretal order may be suspended, impeached, corrected or set aside by bill of review, or supplement in nature of; bill to impeach on the ground of fraud; bill to suspend the operation of decrees; as well as by petition for rehear-

(4) 3 J. Ch. 415.
(5) 1 J. Ch. 200.
(6) 1 Ves Jr. 93.
(7) 1 J. Ch. 200. Sed vide. R. 126. 2 Sch. & Lef. 574. 645. 658.
(8) 4 Madd. 464.
(9) See 4 J. Ch. 545. 17 Ves. 293. 4. Coop. 134. 5 Madd. 121. 4 Madd. 248. 1 Russ. 475. 2 Sim. & Stu. 64. 7 Price, 661. 2 Madd 391. 1 Paige 189.
(10) 7 J. Ch. 137. 3 J. Ch. 78.
(11) 1 Paige 189. See 13. Price. 316. M'Clel. and Young 347.
(12) 4 J. Ch. 35. sed. vid. 2 Ves. 113.
(13) 1 J. Ch. 211.
(14) 12 J. 521. It seems, from this case that a motion might have been sustained had there been fraud or collusion.
(15) 1 Cowen 691. see ante §31.
(16) 12 J. 521. 5 J. Ch. 555.
(17) 3 Dow. 146. see also, 12 J. 521.

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ing and appeal.(18) It may be here observed, that any decree may be impeached for fraud, by an original bill,(19) but in no other case, excepting by bill of review.(20) The subjects of rehearing and appeals are applicable as well to petition, causes, as suits by bill, and will therefore be considered in a general point of view, before we proceed to the enrolment of decree in petition; this being now allowable in certain cases,(21) as in suits by bill, in which if there be no rehearing or appeal on a final decree in thirty days from its entry in the minutes, the proceedings may be enrolled, filed and docketed.(22)

§ 57 Rehearin, when and in what caes & before whom.

The cases in which a rehearing may be granted by any vice-chancellor, must be prescribed by the chancellor. (4) Accordingly no such rehearing can be granted, unless applied for within six months after the entry of the decree or order complained of, and before it is enrolled.(5) A rehearing before the chancellor may be applied for at any time before the enrolment.(6) But if a rehearing is not applied for within 30 days after the decree or order complained of is entered, the court may require payment of the costs incurred by the adverse party by any proceedings under the decree or order as a condition of granting the rehearing,(7) Rehearing is not now a matter of course in any case;(8) it rests in the sound discretion of the court;(9) but is not granted on an order or decree by consent; (10) nor on a decree for costs unless there be colourable ground, or special circumstances. (11)

§ 58. How applied for.

The application for rehearing is by *petition* addressed to the chancellor, and presented to him or a vice-chancellor having jurisdiction of the matter, in manner before directed [§. 5. &c.] It must state clearly the grounds of application, (12) the special matter or cause on which the rehearing is applied for, and the particular points in

(18) See, 1 J. Ch. 195. 553. 200. 2 J. Ch. 488. 205. 5 J. Ch. 60. 4 J. Ch. 199.
(19) 5 J. Ch. 60. 4 J. Ch. 199.
(20) 1 J. Ch. 189. 195. 2 J. Ch. 488. 205. 1 Paige 263.
(21) R. 123.
(22) 2 R. S. 181. § 91-3.
(4) 2 R. S. 177. s 52.
(5) R. 112.
(6) R. 112.
(7) R. 112.
(8) R. 113. sed vid. 1 Paige 256. 1 Hopk 112 *contra.*
(9) 7 J. Ch. 256 1 J. Ch. 48. 2 J. Ch. 317. 1 Paige 256.
(10) 1 Cowen 691. 12 J. 521. ante § 56.
(11) 2 J. Ch. 48. 1 J. Ch. 317.
(12) 2 J. 488. 1 Sch. & Lef. 398. 1 Meriv 35. 19 Ves 550. See petition, Bla. 169. 171. 41 appx.

which the decree or order is alleged to be erroneous.(13) The facts, if they do not appear from the records of the court must be verified by affidavit of the party or some other person. It shall also be accompanied by the certificate of two counsel, who are not solicitors in the cause, that they have examined the case, and that in their opinion the decree or order is erroneous in the particulars mentioned in the petition.(14) A copy of the petition and usual notice of presenting it, [see § 11. 13, 14.] must be served on the adverse party.(15) But the petitioning party, as in other cases whenever he is entitled to an order to stay proceedings, or for temporary relief, until he can give regular notice of presenting the petition for rehearing, may apply for an order to show cause, and for stay of proceedings; serve his order, notice and copy of petition(16) as before mentioned, [§12.] and proceed thereupon as also directed [§ 12-27.] until the petition is presented. The order to stay proceedings is necessary, as no rehearing is of course, and the petition not a supersedeas.(17)

§ 59. Hearing on motion for rehearing; order of dismissal, or for rehearing.

On presenting the petition, and moving for the rehearing, the merits of the application are discussed or submitted, and an order(18)drawn and entered [See §27. 33.] If not granted, or the petition be rejected or dismissed, and the petitioner be aggrieved, an appeal lies to the chancellor or the court of errors(19) in the manner hereafter directed[§62.] If a rehearing be ordered, it is brought on by notice for the same time, and as the original hearing had been. [See § 11. 17.] This in petition cases would be a regular motion day.[§ 15.] Causes for rehearing are placed in the class to which they belonged before the decretal order complained of, and according to their priority as it then existed.(20) But if a rehearing be granted, the petitioner will lose the benefit of it, unless, within ten days thereafter he deposit with the register, assistant register or clerk, 50 dollars to answer the costs and damages of the adverse party, if the decree or order should not be materially varied.(21)

(13) R. 113. It must not state a different case, or introduce circumstances not before the court at the time of the decree: or it will be ordered off the file. 19 Ves. 550. 1 Meriv. 35. 3 P. W. 8.

(14) R. 113.

(15) R. 113.

(16) R. 114. See Bla. 173. 179.

(17) Sed vid. 1 Hopk. 12. Bla. 170. contra.

(18) Bla. 56. appx. Eq. Draft. 641.

(19) 12 J. 499. n.

(20) R. 1.

(21) R. 115 3 J. Ch. 364-5.

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§ 60. Rehearing, preparations for & arguing.

The cause having been duly noticed, points interchanged, notes of issue served on the register, &c. four days before term, specifying the class to which it belongs;(22) a copy of the decree or order to be reheard, copies of pleadings, abstracts, case, depositions, &c. on which the same was founded, and a copy of the opinion if one was filed,(23) being obtained in due season, and furnished the chancellor or vice-chancellor on the rehearing, the cause is brought on according to its priority as before stated. If it is heard or submitted on rehearing, the necessary papers must be furnished by the party who obtained the rehearing.(24) He also, if the cause be reheard, will have the right to open and close the argument.(25) As to him it is opened only in those parts of the decree complained of in the petition; but as to the other party, the whole matter.(26) Evidence is admissible such as was omitted on the prior hearing by negligence to be read, or of papers since found and provable *viva voce*, or testimony to show the incompetency of a witness in a former deposition; but not new testimony to the merits.(27)

§ 61. Annulling or affirming on rehearing.

The decree may be annulled varied or affirmed. If affirmed by a vice-chancellor or the chancellor, no second or further rehearing will be allowed.(28) The decree may now also be enrolled. [ante § 56.] But after the rehearing, and as well before as after the enrolment,(29) it may be appealed from. The subject of enrolment will therefore be reserved until after appeal, final decree, and taxation, as the bill of costs may now form a part of the enrolment.

7. APPEALS.

§ 62. Appeals what cases.

An order or decree on petition in chancery may be appealed from, to the court of errors.(1) But if the order or decree, whether in petition or bill, be made by a vice-chancellor, it must first be reviewed by the chancellor, except in the specific case hereafter mentioned. The numerous instances in which appeals are allowed, render the consideration of this subject of preliminary importance to the commencement of proceedings, either by ori-

(22) R. 92. 94.
(23) R. 93.
(24) R. 94.
(25) R. 115. 1 J. Ch. 444.
(26) 3 J. Ch. 594.
(27) 5 J. Ch. 256.
(28) R. 112.
(29) 20 J. 668. See 12 J. 499. n.
(1) 8 Cowen, 350.

ginal petition or original bill. For instance, an appeal may be brought on an order made in the very first stages of proceeding after appearance of a party in court whether prosecuting or defending. Thus, on an order *refusing*,(2) *dissolving*(3) or *refusing to dissolve, an injunction* and awarding costs,(4) orders on petition,(5) as dismissing a petition for rehearing;(6) order refusing to open the proofs and re-examine a witness who had suppressed part of his testimony,(7) or where incompetent witnesses were admitted on hearing,(8) and now, on a general decree for, or that part which relates to costs.(9) There is no fixed rule or line of distinction governing appeals on interlocutory orders. But when the order materially affects the merits, or is such that a party may be aggrieved by it, the court may entertain an appeal. It does not depend on the question whether the order was one of discretion or even of practice.(10) A party may claim of the court of chancery to conform its proceedings to the peculiar circumstances of a case, when the rules of proceeding adopted for ordinary cases come in conflict with his right to have the full benefit of a defence.(11) And although the judges have attempted to mark a line of distinction, yet the present chancellor(12) in an opinion recently delivered in the court of errors, remarked that he could not conceive of any order which does not affect the merits, either directly or indirectly. Initiatory orders possibly might be an exception, such as an order for the examination of a witness, where all exceptions are reserved until the hearing.(13) Where a party is aggrieved or may be aggrieved by an order, he has the right to appeal. To deny the right when the or-

(2) 3 Cowen 714. sed. vide 3 J. 566.
(3) 14 J. 63. See 2 Wend. 231. 6 Cranch. 51. contra.
(4) 4 J. 510. 2 J. Ch. 413. 2 Wend. 231, 232. 3 sed. vide 31 J. 566.
(5) 8 Cowen, 350. See 2 J. 543.
(6) 12 J. 499. n.
(7) 2 Wend. 225, in error.
(8) 3 J. 566.
(9) See 2 R. S. 605, § 79. 2 Wend. 234. 1 Cowen 691. 8 Cowen, 350, 355, 358. Sed. vide 12 J. 500. 2 J. Ch. 317.
(10) Per. Marcy, Justice, in Beach vs. Fulton in error, 2 Wend. 230 225-6.
(11) Per Marcy, J. ib. See also 2 Swans. 374.
(12) Per Chancellor. Walworth. in 2 Wend. ib. 229. 225.
(13) See 3 J. 566. Of this character was the cause of Buel vs. Street, 9 J. 443-9 which was an order for attachment to bring up a party for disobeying an injunction; so, no appeal lies on default of defendant for not appearing at a hearing, regularly set down, 12 J. 493. nor on an order or decree by consent and some other cases. See 1 Cowen 693. 8 Cowen 328-347. See ante § 56.

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Appeals may be brought:

1st, To the chancellor:

1. from the judgment order or determination of a court of common pleas in relation to the person and estate of a habitual drunkard;
2. from the order, sentence, or decree of a surrogate;
3. from the decision of a *circuit judge*, in certain cases, on appeal from a surrogate;
4. from the order or decree of any *vice-chancellor*, except when the chancellor is a party, and the appeal is then,

2d. To the court of errors:

1. from the orders and decrees of the chancellor;
2. from those of a vice-chancellor acting as chancellor where he is a party or interested;
3. from those of a vice-chancellor, after his order or decree has been appealed to the chancellor, and by him reversed, modified or affirmed.

COMMON PLEAS.

§ 63. Appeals to chancellor from common pleas.

1. The common pleas are vested with the same powers as chancery in relation to the person and estate of habitual drunkards, where the property is less than 250 dollars. It is then the duty of the overseers of the poor to apply for a commission in the nature of lunacy, &c. to that court, or a first judge thereof in vacation; the inquisition in this case being returned to the next court, confirmed, set aside, or if traversed, tried on an issue awarded, and upon a verdict given, judgment is rendered.(16) From the judgment order or determination of the court, made upon any proceedings thus instituted, an appeal lies to the court of

(14) Per Chancellor Walworth, 2 Wend. ib.

(15) 8 Cowen, 350.

(16) 2 R. S. 52, 53.

chancery; but within three months only thereafter,(17) and must be accompanied by a bond, with such sureties as the court approve, to the opposite party, in the penalty of 100 dollars, conditioned for the payment of such costs as shall be awarded against the appellant, if the order, judgment or decree, be affirmed.(18) The court of chancery proceeds thereon in the same manner as upon appeals from surrogates.(19) But appeals in this case need not be placed on the calendar, but may be heard on any regular motion day, or in term.(20)

SURROGATES.

§ 64. Appeals from surrogates, when and on what conditions.

2. The court of chancery, having the jurisdiction of the late court of probates,(21) appeals from surrogates have heretofore been exclusively to the chancellor, sitting as a court of probates, and thence to the court of errors.(22) Appeals may be made from the orders, decrees and sentences of surrogates, in all cases, to the court of chancery, except where provision is made for appeals to circuit judges, and except appeals from orders concerning any admeasurement of dower.(1)

The appeal may be from the decree of a surrogate for the final settlement of the account of executors and administrators if entered or made within three months after the decree recorded;(2) from a final order on the settlement of a guardian's account in the manner within the time and with the effect, as in case of administrators;(3) from any order for the appointment, removal or refusing to remove a guardian, if within six months after order entered;(4) in which case the chancellor will make such order for notifying the adverse party, and correcting such proceeding as he may deem just.(5) In all cases not above specified, appeals from surrogates must be made within thirty days after the order, decree or sentence is made.(6) No such appeal can be effectual until a bond for costs in the penalty of 100 dollars, with the condition

(17) ib. 611. § 119.
(18) ib. 53.
(19) ib. 611. § 120. R. 113.
(20) R. 120.
(21) 1 Hopk. 408.
(22) 5 Cowen, 719-20. As to appeals from surrogates, see that case on reversal of 1 Hopk. 403-9. also 1 Hopk. 552. 1 Paige 171.
(1) 2 R. S. 609. 610.
(2) 2 R. S. 95. 91. 610.
(3) ib. 152.
(4) ib. 153. 610.
(5) ib. 153.
(6) ib. 610.

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prescribed by statute,(7) be filed with the surrogate. Every such appeal when perfected, suspends proceedings on the order, until determined, or until chancery authorise proceedings:(8) except that appeals cannot stay or effect proceedings under orders, for appointing a collector or special administrator on the estate of any deceased person; directing the sale of perishable property; appointing appraisers of personal property, or for the service and publication of notices.(9) Nor can appeals from orders suspending or removing any executor, administrator or guardian, affect any such order until it be reversed;(10) neither can appeals from orders for commitment or awarding process for the commitment of any executor, administrator or guardian, for not returning an inventory, rendering an account, or obeying any other order of a surrogate, or from orders for the commitment of any person refusing to obey any subpœna, or to testify, when required, according to law, stay the execution of such orders or process, until the party committed give the bond,(11) prescribed by the statute,(12) in a penalty not exceeding 1000 dollars, conditioned to surrender himself, if the order appealed be affirmed.

How made.

In every case the filing such appeal in the office of the surrogate, and perfecting the same, by giving a bond in the cases required, will be sufficient notice of the appeal to the adverse party, without any other notice.(14) The proceedings are conducted by solicitors and counsel, and according to the ordinary course of practice in this court in other cases.(15) The party appealing must file with the register or assistant register, his petition of appeal,(16) addressed [as directed § 5] to this court, in fifteen days after appeal entered, or it will be considered waived; cause a transcript of all the proceedings before the surrogate to be made, authenticated and returned to this court within 20 days from the time of entering the appeal, or the chancellor may dismiss it, unless further time be allowed by him to procure the return of the transcript.(17) When the cause is in readiness for hearing, either party may notice it, and have the case entered on the calendar

(7) ib. 610. § 108.
(8) ib. 610. § 109.
(9) ib. 610. § 110.
(10) 2. R. S. 153. 611.
(11) ib. 610. § 111.
(12) see ib. 610-11. § 112. The bond if violated may be prosecuted. See, ib. § 113-15.
(14) ib. § 117.
(15) R. 118. 2 R. S. 611. § 120.
(16) See *post* §
(17) R. 118.

of causes for the term.(18) But appeals from decisions as to the appointment or removal of guardians, need not be placed on the calendar, but may be heard on any regular motion day, or in term. All other appeals from surrogates will be considered calendar causes, heard at terms only, unless otherwise specially directed by the chancellor.(19) The notice of hearing is the same as on special motions or petitions.(ante § 11) The appeal, when necessary to be placed on the calendar, will have priority in the several classes from the time the matter arose before the surrogate.(20) And though either party may notice, yet the appellant's counsel will be entitled to open and close the argument.(21) Costs must be paid by the appellant or respondent, as the court shall direct; and upon affirmance of the decree, or upon the appeal being discontinued or quashed, the court may in its discretion award damages for the delay and vexation caused by the appeal.(22)

CIRCUIT JUDGES.

§ 65. Appeals from circuit judges from their decisions on appeal from surrogates.

3. The *circuit judges* are vested with appellate power over the decisions of surrogates, admitting any will of real or personal estate, to record or probate, or refusing the same;(23) annulling or revoking the probate of a will of personal property, on the ground of its invalidity, or insufficiency of proof, as the last will and testament of the testator,(24) and the proceedings on such appeals are regulated by statute.(25)

An appeal to the chancellor from the decision of a *circuit judge* upon such appeal, where no feigned issue had been awarded, may be entered within one month from the time the decision is certified by the judge to the surrogate, and entered in his office.(26) The appeal must be filed with the surrogate, accompanied with a bond for costs and diligent prosecution of appeal, in the penalty of 100 dollars, as prescribed by the statute.(27) Upon the

(18) R. 88. 120.
(19) R. 120.
(20) R. 91.
(21) R. 120.
(22) 2 R. S. 618. §. 35.
(23) 2 R. S. 66-7. 608.
(24) ib. 62.
(25) ib. 608-9. 66-7.
(26) ib. 609.
(27) ib. 609. § 101. 66 § 56.

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appeal being perfected, the surrogate must certify, and return to this court, the decision of the circuit judge, and copies of the will, papers, and testimony returned by such judge to his office.(28) The chancellor may enforce such return in the same manner as returns to process issued from chancery, and upon the same being made, proceed as in cases of appeals from surrogates.(29) The petition of appeal is addressed and filed in the same manner; the transcript must be had in the same time, and the proceedings conducted as before stated.(30) These appeals are calendar causes, heard at term, unless otherwise specially directed,(31) and governed as to priority the same as similar causes on appeals from surrogates.

VICE-CHANCELLORS.

§ 66. Appeals from vice-chancellors to chancellor.

4. It will have appeared [see ch. I. §3-6.] that in all the cases where a vice-chancellor has jurisdiction exclusively of all other vice-chancellors, but concurrently with the chancellor, an appeal lies to the chancellor.(32) His appallate jurisdiction is not only exclusive of any power in the vice-chancellors, excepting when a vice-chancellor acts as *circuit judge*, on appeal, as before mentioned, but exclusive of the court for the correction of errors, in the first instance, excepting when a vice-chancellor acts as chancellor, where the chancellor is a party or interested, when the appeal is directly to the court of errors. Otherwise, where vice-chancellors have jurisdiction, and proceed on petitions,(33) and bills, with full powers of chancery, their orders and decrees are subject in all cases to the appellate jurisdiction of the chancellor.(34) This appellate power extends also to any order or decree, on any motion, or cause set down for hearing before the chancellor, but by his order referred for hearing and decision to a vice-chancellor.(35)

§ 67. Within what time. How. Appeal to chancellor.

The party aggrieved may within fifteen days after notice of any interlocutory or other order of a vice-chancellor, and within six months after any final decree en-

(28) ib. 609.
(29) ib.
(30) R. 118.
(31) R. 120.
(32) 2 R. S. 168-9.
(33) See appeal in petition for partition, *post* ch. v.
(34) 2 R. S. 177. § 57. 189. § 6.
(35) ib. 168-9. § 3-4. As to appeals from the former equity judges, see 1 Hopk. 508.

tered in the minutes of the court, and either before or after its enrolment, appeal therefrom to the chancellor.(1) The appeal is made by serving notice thereof on the solicitor of the adverse party, and on the register, assistant register or clerk, with whom the order or decree appealed was entered.(2) The party appealing must, within the time prescribed for making the appeal, deliver to the register, assistant register, or clerk, a written notice, stating that such decree or order, or some particular part of it, to be specified in the notice, is appealed from; and within the same time make the necessary deposit, or file the bond required to be given as security for costs on such appeal; and within eight days thereafter, serve a like notice on the solicitor of the adverse party, or the appeal will be considered as waived.(3)

§ 68. Bond or deposit for costs.

Previously to any legislative enactment, the requirement of a deposit by the former rules of the court in the analagous case of appeals to the court of errors was sanctioned by that court, on the ground that chancery might direct upon what terms and conditions an appeal should operate as a stay of proceedings.(4) Now by express enactment and rule of court pursuant thereto,(5) no such appeal is effectual for any purpose, until a bond in a penalty of 100 dollars, with sureties to be approved by any vice-chancellor, injunction master, or by the register, assistant register or clerk with whom the appeal is entered, to be signified by his approbation endorsed on such bond, be given to the adverse party, conditioned for the diligent prosecution of the appeal, and payment of all costs and damages that may be awarded thereon against the appellant; *or* until he shall have deposited the sum of 100 dollars, to be applied under the direction of the court, for the payment of all such costs and damages.(6) But the deposit is not required in cases where the bond

(1) 2 R. S. 178, § 59.
(2) ib. § 60.
(3) R. 117. 2 R. S. 178 § 61.
(4) 2 Wend. 205. 208, in error, where it said that the deposit should be made at the time of filing the petition of appeal with the register. See also, 1 J. Ch. 325.
(5) 2 R. S. 178. § 61. and 2 R. S. 605. pt. 3 ch. 9. t. 3. § 80 to § 89, adopted by the chancellor by R. 116, with the necessary variations as to form merely.
(6) ib. 2 R. S. 605. § 80. and R. 116. No interest on deposit allowed on reversal (20 J. 499.) in error. Sed vid. *post.*

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is given as directed; and the bond so given in lieu of deposit, may be included in any other bond required as a stay of proceedings.(7)

§ 69. Bonds and terms to suspend proceedings below.

1. On decree for payment of money;

An appeal from any order or decree, directing the payment of money, cannot stay execution, process or proceedings thereon, unless a penal bond be given to the adverse party, for at least double the sum decreed, with two sureties to be approved as before directed, conditioned, that if the appellant fail to prosecute his appeal, or it be dismissed or discontinued, or the decree or any part thereof be affirmed, he will pay and satisfy the amount decreed, or such part as to which the decree shall be affirmed, if affirmed in part only, and all damages awarded against him by the court upon such appeal.(8) In

2. For the assignment or delivery of articles;

order that the appeal shall stay the issuing and execution of process to enforce a decree directing the assignment or delivery of any securities, evidences of debt, documents, chattels, or things in action, the articles required to be assigned or delivered must be brought into court, or placed in the custody of such officers or receivers as the court shall appoint; or a bond, in the penalty of at least double the value of the same, be given to the adverse party, with two sureties, to be approved as before directed; conditioned that the appellant will abide and obey the order of the court made upon the subject of

3. For executing any instrument;

such appeal.(9) Or if the decree direct the execution of any conveyance or other instrument by any party, he must first execute the conveyance or instrument, and deposit it with the register or assistant register, to abide

4. For possession of real property.

the final order and decree of the court.(10) If the decree or order direct the sale or the delivery of the possession of any real property, a bond must be given, with sureties, as before directed, in such penalty as the court deem sufficient, conditioned, that during the possession by the appellant, he shall not commit or suffer waste; and that if the appeal be dismissed or discontinued, or the order or decree affirmed, he will pay the value of the use and occupation from the time of the appeal until the

Effect of perfecting the appeal.

delivery of the possession, pursuant to the order or decree.(11) Where the appeal is perfected, by bringing

(7) R. S. ib. § 81. 88. and R 116.
(8) See ib. 2 R. S. 606. § 82. R. 116.
(9) Ib. § 83.
(10) See ib. § 84. R. ib.
(11) See ib. 606. § 85. and R. ib.

into court, or depositing the articles, executing the instruments, or giving the bond as prescribed, the appeal will stay all further proceedings upon the order or decree, and its subject matter; but not prevent the court from proceeding upon any other matter included in the bill, and not affected by such order or decree.(12) If an appeal be made from any interlocutory order, in a cause brought; 1. For the payment of any sum of money; 2. To compel the delivery or assignment of any securities, evidences of debts, documents, chattels, or things in action; 3. To compel the execution of any conveyance or other instrument; or, 4. In causes in which a decree may be made for the delivery of the possession or sale of any real property; the court may, in its discretion, require such other acts and things by the appellant, as in similar cases are required to stay the execution of a final decree on an appeal; and until performed, an appeal from an interlocutory order will not stay the proceedings.(13) Any bond thus required to stay proceedings, may be taken separately from, or be included with the bond to secure the payment of costs upon the appeal.(14) No petition of appeal addressed to the chancellor need be presented, or transcript returned. The original pleadings and other papers in the cause may, by order of the chancellor, and at the expense of the party procuring it, be transferred from one office to another as occasion requires; and the expense of transfer taxable as a necessary disbursement.(15) The notice of hearing is for the usual time [see § 11.] of service in ordinary cases of hearing and special motions; and if served on an agent, double time. [see § 13] When the cause is in readiness, it is not necessary to obtain an order to set it down for hearing; but either party may notice it for hearing, and have the case entered on the calendar of causes for the term.(16) The notice must be for the first day of term, or as early a day in term as practicable. The note of issue specifying the class to which the cause belongs, and the time from which it is entitled to priority, must be delivered to the register or assistant-register, who is to make up the calendar four days previously to the commencement of the term.(17) The appeals, when necessary to be placed on the calen-

Appeal on interlocutory orders. Conditions to stay proceedings.

Bonds how executed.

Appeal by notice, not by petition. Preparations and proceedings to hearing decree.

(12) See ib. 607. § 86. and R. ib.
(13) Ib. § 87.
(14) Ib. 607. § 88.
(15) R. 119.
(16) R. 88. 120.
(17) R. 92.

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dar; have priority in the several classes from the time when the matters arose before the vice-chancellors.(18) But appeals from their interlocutory orders, made on motion or petition, need not be placed on the calendar, but may be heard on any regular motion day, or in term; all other appeals are calendar causes, and heard at terms only, unless otherwise specially directed by the chancellor.(19) If the cause is heard or submitted, the necessary papers must be furnished by the party appealing.(20) A copy of the decree or order appealed from, copies of the pleadings, abstracts, case, depositions, &c. on which the same was founded, and copy of the opinon, if one was filed, must be furnished. In all cases the necessary papers must be delivered to the court when the hearing of the cause commences.(21) If submitted, the submission must be in writing, signed by the necessary parties, or their solicitors or counsel, and be delivered to the register, assistant-register, or clerk where the court is held, with the necessary copies and papers. In calendar causes he will mark the papers, and note them in his minutes as on a hearing, but not enter the submission until all the necessary copies and papers are furnished, as required by the rules and practice of the court.(22) The points on which each party relies being interchanged, and a draft of the minutes of the decree mutually furnished and delivered to the court,(23) the cause may be heard, the appellant being entitled to open and close the argument.(24) On hearing the appeal the chancellor will annul, affirm, modify, or alter the order or decree, or make any other order as justice requires; remit the cause to the vice-chancellor whose order was appealed from, for further proceedings, or direct it to be had before himself, as the circumstances of the case require.(25) If the chancellor do not himself direct the cause to be heard before him, and dispose of the whole subject, his order or decree embracing the points determined, is annexed to the original papers, (no transcript being necessary,) and remitted. The vice-chancellor then takes such proceedings or renders such a decree as is directed;

(18) R. 91.
(19) R. 120.
(20) R. 94.
(21) R 93.
(22) R. 97. as to marking, paging papers, &c. R. 95. ante § 9.
(23) R. 94.
(24) R. 120.
(25) 92 R. S. 178. § 62. see § 63.

and which the party prevailing may enrol and enforce, after procuring a taxation of costs, if any allowed.(26) CHAP. II.

APPEALS TO THE COURT OF ERRORS.

§ 71. Appeal to the Court of Errors. What cases.

Before or after the enrolment, taxation of costs or execution of the decree, it may be appealed to the court for the correction of errors. That court has full power to correct and redress all errors that may be committed in the orders and decrees of the court of chancery, affirm, reverse, or alter the same, and make such other as justice requires.(1) The appeals to the court of errors are: 1 From the orders and decrees of the chancellor; 2. From those of a vice-chancellor acting as chancellor in causes where the chancellor is a party, or is interested.(2) 3. From those of a vice-chancellor, after his order or decree has been brought before the chancellor for review, and by him reversed, modified, or affirmed, and not before.(3) If both parties are dissatisfied, there may be cross appeals from such parts of the order or decree as each party feels aggrieved by, and the proceedings on both are like those of a single appeal.(4) The cases in which an appeal lies to the court of errors from interlocutory orders are as indefinite with respect to any precise line of distinction, between orders appealable and not appealable, as those of appeals from vice-chancellors to the chancellor; and in doubtful or unsettled points, it would seem to rest in the discretion of the court to entertain the appeal under the circumstances of each particular case.[see § 62.]

§ 72. Within what time. 1. On final.

Appeals from final decrees of the court of chancery are made within the same time after enrolment as prescribed for writs of error upon judgments at law, subject to the same exceptions and provisions in favour of persons under disability at the time of rendering the decree, and to the same restrictions, except where provision is otherwise specially made by law.(5) Accordingly the appeal must be brought within two years after the

(26) 2 R. S. 613. 618. See costs, § 80. *post*.
(1) 2 R. S. 166, 167. § 24-27. See 8 J. 566.
(2) 2 R. S. 169. § 7. and ib. 178. 64. See ante ch. 1. § 3-6.
(3) 2 R. S. 178. § 64.
(4) See cases of cross appeals. 8 Cowen 328-332. 5 Cowen 549. 587.
(5) 2 R. S. 605. § 78.

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final decree enrolled,(6) except if any person against whom the decree was made, was at the time, 1. Within the age of 21 years; 2. Insane, or 3. Imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence for any term less than for life; or, 4. A married woman; the time during which the disability continues, is no part of the time limited; but such person may appeal after the time so limited, and within two years after such disability removed.(7) If the person entitled to appeal die during the continuance of such disability, his heirs, devisees, executors, or administrators entitled by law to prosecute,(8) may bring it after the time limited, and within two years after such death.(9) But the existence of any such disability will not authorise the appeal after 5 years from the enrolment.(10)

2. On interlocutory order or decree

All appeals from any other order or decree, including decrees for the general costs of the cause, must be made within 15 days after notice thereof given to the party against whom the order or decree was made, or to his solicitor.(11)

§ 73. How made, notice, deposit or bond for costs, petition of appeal.

The appeal from the decree or order of the chancellor, as well as a vice-chancellor, is made by a notice containing a similar statement to that prescribed in making appeals from a vice-chancellor to the chancellor. [ante § 67.] It must, within the time above prescribed for making the appeal, be delivered to the register, assistant register or clerk, with whom the decree or order is entered; the appellant within the same time must also make the necessary deposit or file the bond to the amount hereafter mentioned required as security for costs, and within eight days thereafter serve a like notice on the solicitor of the adverse party, or the appeal will be deemed waived.(12) This constitutes the appeal, and forms the statement heretofore required by the practice of appeals before the cause is before the court of errors.(13) But with

(6) ib. and 594. § 21.
(7) ib. § 22.
(8) ib. 595. § 23. see who may prosecute, ib. 591. § 1-20.
(9) ib.
(10) ib. 595 § 24.
(11) ib. 605. § 79.
(12) R. 117.
(13) See Bla. 177-9-180.

regard to the effect of the appeal as a stay of proceedings,(14) the ground has materially changed by the provisions of the revised statutes. The deposit for costs which heretofore ought(15) to have been made at least when the petition of appeal was filed, must now be made, or a bond substituted within a time which may expire before the petition need be filed; for it is not necessary that the petition should be filed when the appeal is made; though, if after appeal the petition be not filed, returned, or prosecuted to effect, the appellant incurs the hazard of costs for his default or discontinuance,(16) as well as a forfeiture of the deposit, or of the bond given for the deligent prosecution of the appeal, and payment of costs and damages, if any awarded against the appellant. The bond is similar to that before required in appealing from a vice-chancellor to the chancellor; [§ 68] excepting the penalty required by statute is $250;(17) but with the like condition, with sureties, approved by the same officers, and in the same manner.(18) And though a deposit is not now required where such bond is executed, yet, unless a deposit of a like sum be made, in order to be applied for a like purpose, the bond must be given before the appeal can be operative in any respect; otherwise it amounts to a waiver of the appeal. [§ 68.]

§ 74. Petition of appeal, deposit or bond, and bond, &c. to stay decree below.

The petition of appeal must be addressed to the court, the title of which is: The Court for the Trial of Impeachments and the Correction of Errors—consisting of the President of the Senate, the Senators, the Chancellor, and the Justices of the Supreme Court.(19) But the usual address, inverting the order, is: "To the President, &c. (omitting the chancellor) Justices, &c. in the court for the Trial, &c."(20) It sets forth the decree, decretal or other order appealed from, without reciting the pleadings; states that the decree, &c. or some part, which must be specified, is erroneous, and ought to be

(14) See Bla. 176. 1 J. Ch. 77. 3 J. Ch. 66. 120. 160. 7 J. Ch. 295. The appeal will not supersede a prior sale essentially executed under the decree, 2 J. Ch. 505.
(15) 2 Wend. 205. 208. in errror.
(16) 2 R. S. 618.
(17) 2 R. S. 605. § 80.
(18) ib. R. S. 605. § 80, 81. R. 116, *ante*. § 68.
(19) See constitution, art. 5. 2 R. S. 164. R. 7. of court of errors.
(20) See Bla. 188.

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reversed or modified, as the case may be ;(21) and when filed in the recess of the court, must pray that the decree, &c. may be sent to this court on the first day of the next session thereof; or if filed during the sitting, that it may be sent without delay.(22) It is signed by the solicitor and counsel of the appellant, and filed with the register or assistant register with whom the decree was entered.(23) The deposit may be made, or the bond in lieu thereof approved and filed at the time of filing the petition,(24) if the time limited to secure the operation of the appeal be not then out. But although this bond be given, or the deposit made, yet the appeal cannot now operate, as it formerly did,(25) as a supersedeas or suspension of process or proceeding on the decree or order appealed from, unless in the particular cases prescribed by the statutes,(26) and adopted (27) in proceeding on appeals from the vice-chancellors to the chancellor, the same bonds, either separately or united in the bond for costs, be executed and approved, the same terms and conditions complied with, and the same acts performed as were directed under the former proceedings. [*ante* § 69.] In addition to which it is also provided(28) in appeals to the court of errors that in all cases not thus regulated, the filing and perfecting an appeal by giving the bond for costs, shall stay all proceedings in chancery upon the order or decree appealed from, and its subject matter, except, 1. When the order directs the sale of perishable property, it may be sold by a special order of the court, after appeal, the proceeds being brought into court to abide the final order or decree of the court of errors; or, 2. When the order is interlocutory, either party may proceed at his own expense under the direction of the court, upon proper cause shown, to take testimony, conditionally, to be used thereafter in the cause, in the same cases in which testi-

(21) R. 8. of the court of errors. See 4 J. 536. *sed vide* 2 Wend. 225. in error. See also, Bla. 183-5. 3 J. 564. 14 J. 527. It was formerly held sufficient to recite such parts of the decree only as appealed—the reasons for appeal and a reference to, but not a recital of the pleadings, ib.

(22) R. 8. of court of errors.

(23) Vid. 16 J. 604. 2 Wend. 205. 207-8. 1 J. Ch. 325.

(24) 2 Wend. 205-9.

(25) See Bla. 176, 7. and authorities cited.

(26) 2 R. S. 605-7. § 82 to 89, inclusive. *ante* § 69.

(27) Ib. and R. 116.

(28) R. S. ib. § 89.

§ 75. Proceedings, transcripts, & return of petition to court of errors; and order to answer.

mony taken conditionally in an action at law,(29) may be used; or, 3. Where the order is for the commitment of any person for a contempt, or for the purpose of enforcing the rights or remedies of any party, proceedings on the order may be had notwithstanding the appeal, or stayed, as the court may direct on such terms as it may think proper to impose.(30) The original papers, proofs and pleadings remain in chancery and transcripts only are examined by the court of errors.(31) The officer with whom the petition is filed must make and annex to it, the decree or order appealed from, and such other orders as may be required to be returned to the court of errors, without any of the pleadings, proofs and exhibits in the cause, and if it had been heard, prior to the decree, &c. he must cause to be annexed a copy of the minutes taken by the register or assistant register, respecting what was read, or used in the court below, or offered and overruled on objection, or admitted at the hearing; authenticated copies of which pleadings, proofs and exhibits, or such of them as may be relied on by either party must be produced at the hearing, by the parties.(32) The appellant must cause the petition with the papers annexed, to be transmitted and filed with the clerk of the court of errors, by the day mentioned in the petition, or when duly prepared by the officer, or in default will lose the benefit of the appeal, unless the court allow a further day for the purpose.(33) The sessions of this court are held at the Capitol in Albany, at such times as the court from time to time directs; but not more than two such sessions can be held during the recess of the legislature, in any one year.(34) The petition, transcript of the decree, and minutes of hearing annexed, must be returned to the court immediately, if in session. But if the petition be filed during the recess, then on the first day of the next session. The court is possessed of the cause by relation from the time when the petition was returnable during the session, and it might perhaps in this case, be regular to enter an

(29) vid. 2 R. S. 391, 2, 3.
(30) ib. 607. § 89.
(31) 12 J. 497. But vouchers and exhibits retained by parties, & marked as having been read merely, are produced in error. Bla. 181-2. 180.
(32) R. 9. of court of errors.
(33) R. 10. of court of errors.
(34) 2 R. S. 164. § 7.

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order to answer, during the recess.(35) But if filed in the recess, the court is not possessed of the cause until the first day of the next session. And in neither case can an order to answer be regular, until the petition with the transcripts annexed is actually returned and filed in the court of errors.(36)

§ 76. Prior to argument; rule to answer motions, &c.

The appellant may then obtain an order of course, for the respondent to answer the petition in 8 days after service of copy thereof, or be precluded.(37) This may be entered at any time, by the clerk, of course, in the minutes upon the written request of the solicitor or counsel, at the peril of the party entering the same, with the like force and effect as if entered by direction of the court during its session.(38) The rule must be served on the solicitor of the respondent; or if none, personally.(39) The solicitors for the parties in the court below, are deemed the solicitors for them respectively, in all the proceedings on the appeal under the rules of the court, unless a new solicitor be employed in this court, and notice thereof given.(40) The service required prior to all motions, and copies of orders and affidavits in this court during its sitting, may be made on the counsel of the parties attending, and also on the agent in the court of chancery of the solicitor for the parties; but when made on agents or counsel, double the usual time is required.(41) The respondent must, before answering the petition, object to formal defects or omissions.(42) If the petition be not filed, he may rule the appellant. Orders to file petitions may, like those to answer, be entered of course, at any time by the clerk on written request, at the peril of the party, and with the like effect as if entered by direction of the court during its session.(43) But previously to the new rules and statutes, requiring the deposit or bond and notice in a given period, or that the appeal be considered waived, it was held that if the petition was not filed with the register as directed, and no transcript or minutes returned, and no deposit made on filing the petition, the respondent

(35) Per Ch. Walworth 2 Wend. 207. in error.
(36) ib. See 1 J. Ch. 325.
(37) R. 11 of court of errors. This was formerly on special motion in court. Bla. 191. 187.
(38) R. 26. of court of errors.
(39) 8 J. 441.
(40) R. 13. of court of errors,
(41) R. 24. of court of errors. See R. 22. ib, *post.*
(42) 3 J. 364. See ante § 22.
(43) R. 26. court of errors. See Bla. 186–7, where it is suggested

might move to quash the appeal, and set aside all proceedings for irregularity, which though granted might still be without prejudice to the right of the appellant to file a new petition;(44) and that an application to set aside the appeal for not filing it in fifteen days, must be by motion, and would be too late at the hearing.(45) The court have the right to award costs against the party neglecting to file the appeal, &c. according to the rules of the court, or if the appeal be discontinued or quashed, award damages for the delay and vexation caused by the appeal, and award costs against either party for any discontinuance or default.(46) The respondent may also move to dismiss the appeal, on the ground that the order appealed from, is not of such a character that an appeal should be sustained upon it, and this motion does not necessarily involve an examination of the merits of the case.(47) Notice of this or any special motion, or of presenting a petition, may be for any Monday during the session of the legislature, and it may be brought on then, or any subsequent day when the court is in session.(48) But all special motions require previous service of a notice, with copies of the papers, not records of the court, for at least four days,(49) On the part of the appellant: if the respondent do not answer the petition, pursuant to the order entered and served, he will be precluded from answering it, and the appellant may proceed to take such decree as the case may require.(50)

§ 77. Answer and preparations for argument; case; notice; calendar; argument.

The answer to the petition is a general one, not confessing or acknowledging the subject matter of the petition, but confessing and referring to the decree when produced, insisting upon its correctness, that it should be affirmed, and the petition be dismissed with costs.(51) This being signed by counsel, filed and served, the cause is at issue and may be placed on the calendar.(52) Previously to any argument of counsel, upon any appeal, a state of the *case of each party*, as it appears in the plea-

that a respondent might move the court for an order in the nature of a ne recipiatur, unless petition be filed, in a given period, as eight days.

(44) 2 Wend. 206-9.

(45) 8 Cowen 349, 350.

(46) 2 R S. 618. § 34-5.

(47) Per Sutherland, Justice, 2 Wend. 227. in error.

(48) 2 Wend. 221.

(49) R. 22. court of errors.

(50) R. 11. court of errors. vid: Bla. 187.

(51) Grant, 209. Harr. 353. Bla. 191. 187.

(52) 20 J. 501. in error. 1 J. Ch. 326.

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dings and proofs and a brief statement of the points intended to be relied upon in argument, signed by their respective counsel, and to which must be added the reasons of the chancellor for his decree, must be delivered to each member of the court.(53) If the reasons are not annexed when the appeal is brought to argument, it will not be heard, unless it appears by affidavit that application was made for such reasons, and the same could not be obtained.(54) All causes put at issue may be brought on to argument upon the notice of either party, to be served at least 14 days before the day on which it is intended to bring it on, which must be some day on which the court will be in session, and a copy of the notice must also be furnished to the clerk of the court, at least four days before the day appointed for argument: the clerk must make a list of the causes noticed, arranging them in the order in which the answer to the petition of appeal therein was filed; and when the court is ready to proceed to the hearing of causes, the same will be called in the order in which they stand on such list.(55) When any cause put on the list is called in its order, and either party fail to appear, the court will proceed to hear the cause *ex parte* upon the application of any party having given regular notice, to be shown by affidavit, or admission of service of notice, unless the court think proper to postpone the argument.(56) When any preliminary question, not made in the court below, and not involving the merits of the cause, is presented for argument, it must be first argued, and passed upon by the court; and the argument upon the merits will be postponed until the preliminary question is disposed of unless the court otherwise direct.(57) When the decision of a cause depends upon distinct questions, the decision of either of which will dispose of the cause, the questions must be taken seperately, if required by any three members.(58)

Whenever any matter is moved for a hearing, whether upon the merits, or upon a preliminary, or interlocutory question, pursuant to notice for that purpose, and the

(53) R. 12 court of errors; vid. 14. J. 561. Bla. 182-3
(54) R. 25 court of errors. 4 Cowen. 713.
(55) R. 14 court of errors.
(56) R. 15 court of errors.
(57) R. 16 court of errors.
(58) R. 17 court of errors.

party whose right it is to appear and oppose, makes default, the court will proceed and hear the matter *ex parte*; and no decision will be given upon the mere default of appearance.(59) At the hearing of causes one counsel only can open the argument, two answer, and one reply or close, except in special cases on appeal, where there are distinct parties on the same side having distinct interests in question.(60) No member of the court can as solicitor or counsel be concerned in, or argue any cause unless he was, without reference to this court, actually retained and employed in the cause in the court below before the decree on which the appeal is founded was rendered, or was actually retained in the cause previous to his becoming a member.(61) If at the time of entering an appeal in the court, or at any other time when adjourned or continued, a quorum be not present, it will not be abated or discoutinued, but may be adjourned or discontinued by the members present.(62)

§ 78. Further proceedings in the court of errors to decree.

As to the further proceedings in the court of errors, (63) the practice of the house of lords in England, when sitting as a court of appeals, is adopted by this court on appeals from chancery, in all cases not provided for by the rules of the court.(64) On the hearing the chancellor must inform the court of the reasons for his decree.

The reasons are submitted in writing, and must be assigned before the argument of the appeal; on any interlocutory question, not affecting the merits, or any point decided in the court of chancery, he may vote; but he has no voice in the final sentence.(65) If any of the parties in interest become changed pending the appeal, by death or otherwise, the cause will be remanded without prejudice, that chancery may bring in the parties whose interest may have accrued since the appeal.(66) The court frequently makes a final decree upon an interlocutory order appealed from, and disposes of the whole cause.(67) The order or decree may be affirmed, rever-

(59) R. 27. of court of errors.
(60) R. 21. of court of errors.
(61) R. 20. of court of errors.
(62) 2 R. S. 167.
(63) See Bla. 192-7. and 20 J. 603. 2 Wend. 213. 215. 209. Johns. Dig. tit. Chancery. Appeal B. 2 R. S. 164-7. 8 Cowen 398. 761. 532. 764. n. 328, 32. 327. 342. 347. Whether court of errors can cause issue of fact to be tried by a jury, ib. 3 Cowen 713-14. 2 Cowen 13-14. 249. 400. 402.
(64) 2 Wend. 207. and R. 28. of court of errors.
(65) 2 R. S. 164. and R. 23. of court of errors.
(66) 9 J. 442. 2 J. 487.
(67) See 2 R. S. 167. 2 Wend. 205. 1 J. 529. 1 J. Ch. 486. 2 C. C. E. 66. See 1 Cowen 691.

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sed, or modified, that is, affirmed in part, reversed in part.(68) The court renders such a decree as chancery ought to have made; reverses what is wrong, decrees what is right, and models the relief according to its own views of the ends of justice and the exigencies of the case.(69)

§ 79. Remittitur & costs and proceedings below.

On hearing and determining the appeal, all the proceedings, with the judgment, decree, or order of the court, are remitted to the court of chancery, where such further proceedings are had as will be necessary to carry the decree or order into effect.(70) The remittitur contains a copy of the decree or order of the court annexed to the petition of appeal, and the matters thereto annexed as brought into this court, under its seal and signed by the clerk.(71) This decree or order becomes the law of the case, and care should be taken in drawing it up, that it embrace all the points determined, where the decree is modified or reversed, that the court below may know with precision the directions of the court above.(72) All costs awarded on the appeal must be taxed in the court of chancery, and when taxed, inserted in the judgment of this court sent down, and the payment be enforced by chancery.(73) The taxable costs and fees of officers in the court of errors are prescribed by statute.(74) After the remittitur, it was thought doubtful whether the court of errors on motion could amend or modify it.(75) But it has been allowed to be modified on petition, so far that a decree giving costs on reversal was amended, though the transcript and remittitur were in the hands of the register, the receiving and filing the same having been suspended by order of chancery.(76) The costs in chancery follow the dismissal of a bill ordered by the court of errors, and

(68) See 5 Cowen 584-7. 654. and the cases decided in error. See a decree in a case brought before a circuit judge in the former court of equity, thence to chancery, thence to court of errors making various provisions as to costs, and referring to divers interlocutory orders and final decrees of the courts below. 5 Cowen 580. 585-7.
See the forms in cases in error.
See form of order of reversal, 2 Cowen 248.
(69) 1 J. Ch. 109. 194.
(70) 2 R. S. 167. § 28. See Bla. 198.
(71) R. 18 of court of errors.
(72) 1 John. Ch. 189. 194. Bla. 198. Eq. Draft. 625. 618. vid. 5 Cowen 548. 568. Sed. quere.
(73) Rule of errors, Apl. 7. 1829. 2 Wend. 239, 240. amending the 19th rule of the court which was declared (1 Wend. 26) to clash with 2 R. L. 4. as to taxation of costs.
(74) 2 R. S. 922-5.
(75) Spencer Ch. J. 20. J. 500.
(76) 2 Wend. 221. Murray v. Blachford.

whenever the merits of the decree are disposed of, that court have claimed the right to adjudge as to costs.(77) On affirmance costs of both courts have been given,(78) but on reversal, no costs in error on appeals,(79) Now, by statute,(80) beside costs on neglect to file an appeal, or for default or discontinuance as mentioned.[§ 76] costs are to be paid by appellant or respondent as shall be directed by the court, and upon affirming any decree, or upon the appeal being discontinued or quashed, the court may, in discretion, award damages for the delay and vexation caused by the appeal. On presenting the remittitur, and on special motion, without notice the court below will grant an order or decree to be entered on filing the remittitur, pursuant to, and in the terms of the order or decree of the court above. If the appeal was on an interlocutory order, and the court of errors had not disposed of the whole subject matter, the proceedings are resumed at the stage of the cause when the appeal was made. If the decree be final, the costs may be taxed, decree enrolled, [post § 83.] and process of execution(1) issued. But if a decree, wholly reversed, had been enrolled, and the transcript of the docket sent to the clerks of the supreme court, then in order to remove the lien, the register, &c. with whom the decree was filed, must certify the fact of reversal to the clerks, who will enter it in the transcript of the docket.(2)

7. COSTS.

§ 80. Costs in general.

The closing order of this general view of the subject of petitions as connected with bills will be: 1 Costs, in general and the taxation, the taxed bill now forming part of—2 the enrolment; execution, and cancelling the lien of record. The question of costs deserves in almost all cases a preliminary consideration, and should be well understood before the interest of a party becomes jeopardised

(77) 2 Wend. 221. see further as to costs on appeals. 1 John. Dig. 182-3. Bla. 197-8. 1 Cowen 693. 2 Cowen 400. 402.

(78) 8 Cowen, 325.

(79) 2 Wend. 221. 1 Wend. 625. contra. See cases cited, 2 Wend. 224. 20. J. 500. Mackie v. Cairnes. 5 Cowen 587. was a case of cross appeals, and therefore distinguishable from ordinary appeals.

(80) 2 R. S. 618 § 34, 35.

(1) See fi. fa. for sum decreed and costs, after affirmance by the court of errors. Rules of chancery, appx. No. 9.

(2) 2 R. S. 182-3.

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Costs in equity.

by proceedings in which no costs would be recoverable, or not unless some step be taken prior to the suit; as where a petition is filed without an order, when a bill would answer. [see § 2.] A demand should be made before suit brought, as for discovery,(3) or dower,(4) or in other cases requiring a previous demand, request or notice, as of subsequent incumbrancers of mortgaged premises.(5) Where prior application is made, costs have been given even against a trustee refusing a conveyance unreasonably.(4)

The plaintiff dismissing his own bill or petition, or the same being dismissed for want of prosecution, pays to the defendant his costs to be taxed; except in those cases, where, according to the practice of the court, costs would not be awarded against such complainant, upon a decree rendered on hearing of the cause. In all other cases, where no special provision by law, the costs of all suits and proceedings in equity, whether originally commenced in such court, or brought there by appeal, are paid by such party as the court direct.(1) In appeals, [§] and in certain interlocutory proceedings and special cases, which will appear in the course of the practice, provisions of law have been made.(2) The discretion of the court, where no such provisions exist, is a sound discretion, to be exercised upon a full view of all the merits and circumstances of the case. Hence costs do not always follow the event, but are awarded or not, according to the justice of the case.(3) For instance, a party having reasonable ground for opposing a motion, may be entitled to the costs of opposing it, though he fail in it.(4) But the general rule is that he who fails is *prima facie* liable, and must show circumstances to avoid it,(5) and that where a creditor recovers a debt, he recovers costs, unless special reasons intervene, and costs too of the whole litigation, though he fail as to part of his

(3) 4 J. Ch. 503.
(4) 1 Paige 192. 4 J. Ch. 604.
(5) 3 J. Ch. 61. Sed. vide, 6 J. Ch. 435. *post* ch. vi.
(6) 11 J. 555. See 6 J. Ch. 411. 2 J. Ch. 166. Sed. vide. 4 J. Ch. 445. 6 J. Ch. 33. See also 1 Paige 32-35. 49. 6 J. Ch. 61. 445.
(1) 2 R. S. 613. 618.
(2) See also costs in Chancery. 1 Johns. Dig. 199. 204. Bla. 199. 204. 1 Paige 178. 300. 82. 139. 49. 33. 1 Hopk. 344. 100.
(3) 12 J. 500. See 1 Johns. Dig. 199.
(4) M'Clelland's Rep. 10. See also, ante § 21.
(5) Harr. 354. Grant 223.

demand.(6) Where parties stand equally fair in every respect, the actor who brings the other into court ought to pay the expense;(7) but where both parties equally innocent are endeavouring to avoid a loss caused by a third person, no costs will be awarded to either against the other.(8) It may also be laid down as a general rule, that where there is a fund, and parties prosecuting or defending, are necessarily in court, and have acted bona fide, costs are payable out of the fund, or assets, as in a necessary ex parte application by executors for directions of the court;(9) or on bill by legatee against administrator who submitted and asked directions,(10) or in favor of subsequent incumbrancers brought in, on a foreclosure, if not requested to release, and no notice of the object of the suit given to them before their appearance;(11) and in some other cases;(12) or if not payable from any fund, that each party acting honestly or in equal right, or under peculiar hardship, &c. bears his own costs.(13) It is another general rule that costs die with the person *pendente lite*, unless payable from a fund, or connected with a duty towards the party claiming them when they are given as relief, for example to personal representatives as such on bill of revivor—not if such, and also as heirs and devisees.(14) So plaintiff loses his costs by laches, or by neglecting to obtain a final decree in season, or if the decree be silent as to costs, unless on rehearing (which would not be granted unless under special circumstances) the decree be opened for that purpose.(15) The costs or fees of officers,(16) and in some instances of parties, as where the people,(17) counties,(18) towns,(19) are interested, are provided for by statute.

(6) 1 Hopk. 344.
(7) 3 J. Ch. 61.
(8) 3 J. Ch. 69.
(9) 4 J. Ch. 608.
(10) 1 J. Ch. 153.
(11) 6 J. Ch. 61. sed vid. ib. 435.
(12) See 1 Paige 32-5. 210. 192. 4 J. Ch. 310. 1 J. Ch. 473. 508. 45. 1 Russell 347. 1 Hopk. 224. 1 Cowen 691. sed vid. 5 J. Ch. 183.
(13) See 4 J. Ch. 441. 445. 562. 310. 86. 93. 65. 79. 303. 604. 1 J. Ch. 166. 2 J. Ch. 152. 441. 3 J. Ch. 129.
(14) 12 J. 500. 1 J. Ch. 85.
(15) 12 J. 500. 2 J. Ch. 317. and 1 J. Ch. 44. 85. See 4 J. Ch. 310. 1 Glinn & Jam. 259.
(16) 2 R. S. 612.
(17) ib. 619. 553. 1 ib. 211.
(18) 1 ib. 384.
(19) ib. 357.

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§ 81. Costs, bills of cost, schedule of fees and taxation.

In order to entitle the solicitor, counsel or other officer, to his costs or fees, the services charged must be actually rendered by him, except where prospective costs are taxable, or where the fee may be demanded previously to rendering the service. When the same person acts as solicitor and counsel in the same cause he is not entitled to fees in both capacities, in relation to the same motion, hearing, trial, pleading or other matter, but must elect in which capacity he will receive compensation for the service. But for particular services rendered in the cause by a solicitor in reference to any matter for which no counsel fee shall be allowed he will be entitled to the fees allowed for such services. No fee for any counsel is taxable unless he is actually employed, nor for any services as having been rendered by him or solicitor, or other officer in the progress of a cause unless the service was actually rendered, except as above provided.(20) If the service be rendered the next enquiry must be whether it was necessary, for the taxing officers are expressly enjoined by the statutes,(21) as well as the rules of court,(22) to disallow all depositions, pleadings and proceedings unnecessary, or unnecessarily prolix, all needless services and superfluous folio, and it is the duty of the chancellor, in proceedings made for the sake of costs, to order the solicitor to pay the costs occasioned by such prolixity.(23) In every bill of costs offered for taxation, the several items of the fees of the officers of the court composing part of such bill, must be particularly detailed, and not charged in gross; in default whereof the same cannot be allowed in the taxation; and no allowance can be made either as between party and party, or as between solicitor and client, for the draft or copies of any repetition of the statements of the bill in the charging part thereof, or in the interrogatories, or for any unnecessary or improper matter, inserted in any pleading, report or other proceeding in a cause, and where the same solicitor appears for two or more defendants, or different solicitors who are partners appear for several defendants and separate answers are put in, or other proceedings had by, or for the defendants separately, the taxing officer in the taxation of the costs, either as between party and party, or solicitor and client, must consider whether such se-

(20) 2 R. S. 650-1.
(21) ib. 653. 183.
(22) R. 130. 132.
(23) 2 R. S. 175.

parate answers or other separate proceedings were necessary or proper; and if in his opinion any part of the costs occasioned thereby was unnecessarily or improperly incurred, the same must be disallowed.(24)

In making out the bill of costs, keeping in view the preceding rules, the title of the suit, and the terms and vacations when the services were rendered being put in the margin; the items are usually inserted in the order in which the services took place, as entered in the register of the solicitor, and are charged according to the following schedule of

SOLICITOR AND COUNSEL FEES IN CHANCERY.(1).

1. Retainer; draft of petition, bill, all other proceedings, engrossing; copying; perusing; signing; abbreviating.

Solicitor's *retaining* fee $3, and retaining fee for one counsel only in a cause $5; solicitor *drawing* every pleading or proceeding in a cause 28 cents for each *folio*(2) of 100 words, *engrossing* same to file, 14 cents, and for every other necessary *copy* 7 cents; counsel *perusing*, *amending* and *signing* every bill, plea, answer or demurrer, and all interrogatories and exceptions, $2 50. Solicitor actually *abbreviating* the pleadings, depositions and exhibits in a cause, for counsel other than the solicitor, 3 cents for each folio contained in writing abbreviated.

2. Services.

Every necessary *notice* or *summons* actually *served*, *including a copy thereof and service*, 37½ *cents; serving* every *rule*, *order*, or copy of *interrogatories* 25 cents; or serving a *subpœna*, to appear and answer, or an *injunction*, 75 cents.

3. Intermediate to hearing and hearing.

Solicitor drawing *brief* for counsel on any *special motion* or *petition* of which notice has been given, $1. Solicitor *attending* the chancellor or a vice-chancellor, *out of term*, upon *petition*, or upon any *special motion*, $1; *attending* the court *in term*, upon a *special motion* founded on previous notice, $1; and if such *motion* be

24) R. 130.

(1) 2 R. S. 629, 630, ch. 10. t. 8.— See precedent of bill of costs; rules, appx. No. 15. See the fee bill of 1818, and the explanation of the same by Chancellor Kent, in a report to the legislature, printed in Bla. 110. 113. in appx.

(2) 2 R. S. 650. But one draft only of any process, pleading or proceeding is allowed, notwithstanding several may have been issued or used. No writing copied in the draft can be computed as part of it. ib. 651.

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argued or *opposed*, $1 50; *counsel attending*, pursuant to notice, argue a *special motion* which is *not* argued, $1 50; counsel arguing every *special motion*, $2 50; to solicitor actually *attending* the court of chancery *upon the argument* of a cause, $5; solicitor drawing *brief* for counsel upon the *hearing* of a cause before the court, when there has been an answer, plea, or demurrer to the bill, $2; counsel *arguing* every demurrer, plea, or exception in court, $5; and arguing every cause in court, *ex parte*, on bills taken as confessed, $2 50; and arguing every *other cause* upon the merits, $8 to each counsel not exceeding two; solicitor drawing, &c. see section 1; counsel *perusing* and *settling* every *final decree* containing special provisions, $2 50; solicitor attending the register with the draft of any decree or order to have the same settled and entered, 50 cents; solicitor drawing brief for counsel upon the hearing before a master on a reference to take and state an account, $2; drawing charges or discharges before a master, for each folio, 22 cents; drawing instructions for the examination of each witness, 25 cents; attending a master on summons, 50 cents; attending upon any matter referred to him not otherwise provided for, $1, if the same be argued, and if not argued, 50 cents; arguing before a master, on a reference to take and state and account, $2 50; counsel arguing, or appearing to argue before a master, pursuant to notice upon exceptions or other matters referred, $2 50; solicitor attending before an examiner or commissioner, on the examination of witnesses, $1 for each day; copy of a bill of costs delivered with notice of taxation, or filed after taxation, if before a decree, 50 cents, if after, $1; attending master on taxation, 50 cents; the actual and necessary disbursments of the solicitor are also taxable.(3) Prospective costs may be taxed for filing and docketing a decree, and for one execution thereon, (4) the bills of fees of the other officers(5) of the court, as regulated by statute,(6) are obtained and inserted, together with fees allowed, commissioners,(7) circuit judges,(8) and other officers au-

4. Orders and decrees, reference, examinations, &c.

5. Costs.

(3) 2 R. S. 634.
(4) ib. 651.
(5) But master's commissions, fees and disbursements on sales, foreclosure, &c. are not inserted, but retained out of the proceeds, and specified in his report of sales. See rules of court, app. 15.
(6) 2 R. S. 621. ch. x. t. 3.
(7) ib. tit. 4. 627. 631. 643.
(8) ib. 626. 631.

thorised to perform certain services,(9) witnesses,(10) surveyors,(11) jurors,(12) printers.(13) CHAP. II.

This schedule will give the sum for each item of service. But the propriety of the item whether the service was necessary, &c. may afford the chief difficulty in the taxations. In England many charges, though disallowed in strict taxation between party and party, are nevertheless very proper charges as between solicitor and client.(14)

§ 82. Taxation and taxingofficers

The bill of costs, if not taxable *ex parte*, is then copied and served, with notice of taxation before a vice-chancellor, or an authorised taxing master, the power of taxing being by statute(15) vested in the vice-chancellors and such masters as the chancellor shall appoint. Charges in the bill for attendance of any witness cannot be taxed without affidavit stating the distance he travelled and the days he actually attended; copies or exemplifications of documents or papers, without an affidavit that such copies were actually and necessarily used, or necessarily obtained for use; or any other disbursements, except to officers for services rendered, without an affidavit specifying the items particularly, nor unless they appear to have been necessary and reasonable in amount.(16) One master residing in each circuit is designated and appointed by the chancellor as the taxing master of such circuit, who is authorised to tax costs when the vice-chancellor of such circuit resides more than twenty miles from the clerk's office, or is absent from his usual place of residence; but in all other cases the costs must be taxed by a vice-chancellor. And where costs have been taxed by a vice-chancellor upon hearing of the parties the application for a retaxation may be made directly to the chancellor, whether the suit was pending before a vice-chancellor or otherwise.(17) After two terms elapsed and the decree signed, it is too late to move for a retaxation,(18) unless there be gross fraud or undue pressure.(19) In England when a motion is made for leave to file exceptions to the master's certificate of taxation, the notice

(9) ib. 631. 637.
(10) ib. 642. 651.
(11) ib. 643.
(12) ib. 643.
(13) ib. 648.
(14) Grant 335.
(16) 2 R. S. 169.
(16) ib. 653. 651. § 14.
(17.) R. 129. *See* Bla. 113. appx.
(18) 1 J. Ch. 44.
(19) 1 Ves. and B. 126. 1 Dick 403.
(20) 9 Price 215.

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of motion must state the exceptions intended to be filed, and on what they are founded; (20) or when made for an order nisi for the master to review his taxation on account of overcharge, the affidavit to ground the order must point out the specific items thereof, and distinctly show that they are erroneous(21)

Whenever money is ordered to be paid for costs by a master out of money in his hands, he must file with the receipt for the amount paid a copy of the taxed bill; and when the register, assistant-register, or clerk, is directed to pay out money for costs, the duplicate receipt of the solicitor receiving the same endorsed on a copy of the taxed bill of costs will, with the receipt for the same entered in the ordinary receipt book of the register, assistant-register or clerk, be the exclusive evidence of such payment in passing his account.(22)

Solicitor and client.

The court on motion or petition will order a solicitor's bill to be taxed, and he is liable to attachment for not delivering his client's writings under an order, upon payment or tender of what is taxed.(23) The circumstance of security having been taken for the costs or of a running account, will not help the solicitor against the taxation of his bill, and the solicitor is bound to refund, if it appears he has been overpaid.(24) Where solicitor has a lien on papers, a reference for taxation, examination of books and an enquiry whether he has been overpaid, and that he deliver up all papers, books, &c. on certain contingences, may be ordered.(25) A solicitor may be examined upon interrogatories under the reference, as to money paid to, or received by him. If he do not pay balance reported due from him, he may be committed upon the usual applications and affidavits.(26) The court may, upon petition without a cause in court, but under its general jurisdiction over solicitors, order a solicitor to deliver his bill for the purpose of getting deeds out of his hands deposited with him in the course of business;(27) and this summary jurisdiction extends to the representatives of a solicitor.(28) A party in a cause wishing to get his papers

(21) M'Clelland 61.
(22) R. 131.
(23) Harr. 392. Grant 473.
(24) ib. Wy. Pr. R. 396. 2 Atk. 25. 3 Ridgn P. C. 522. 4 Bro. C. C. 350.
(25) Eq. Draft 603.
(26) Grant 474. 3. Harr. 394-5.
(27) 6 Ves. 425.
(28) 1 Swans. 84.

and to change his solicitor may move as of course for solicitor to deliver his bill. The order must be served personally. If bill be not delivered in time fixed, another application on notice personally served, and an affidavit of service and non-delivery of bill, may then be made that solicitor stand committed, the order upon which is that he be so committed unless the bill be delivered in so many days. If solicitor still persist, then upon a similar application and affidavit, the order will be an absolute one for committal.(29) The debtor not paying amount taxed is liable to attachment, but the court will not ordinarily and of course interfere to compel payment of a solicitors fees.(30) A solicitor decling to be further concerned in a cause is not entitled to compel payment of his costs,(31) nor claim his lien on a fund in court.(32) If he decline to proceed until his fees are paid, he may be ordered to produce an office copy of the bill to be marked, in order to enable another solicitor to go on with the cause,(33) and also to permit such an inspection of the papers in his hands, or such production of them before the court or the master, as may be necessary in the conduct of the cause.(34) In England, although where plaintiff changes his solicitor the original solicitor cannot stop him from proceeding till his costs are paid,(35) yet he may retain the papers in his possession,(36) and need not produce them for the purposes of the cause when his client has discharged him without paying his bill.(37) But here the change cannot be made but by order of the court, and that would be on condition of such payment. [ante § 18.]

8 ENROLMENT AND EXECUTION.

§ 83. Enrolling, decree, docketing transcript and lien.

Proceedings by petition may be enrolled, [§ 56] when the decree or order directs payment of money, or affects title to property. No process can be issued, or other proceedings had, on any final decree until the same is duly

(29) Grant 474. Harr. 394-5.
(30) Ib. 1 J. Ch. 22.
(31) Grant 473.
(16) 1 Swans. 1.
(32) 14 Ves. 271, 273. 2 Ves. 407.
(33) 3 Swans. 93.
(34) 1 Swans. 61. 1 Ves. & B. 340.
(35) 1 Sch. and Lef. 315.
(36) 13. Ves. 195.
(37) 1 Jacob.

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enrolled.(1) If a master is directed to sell real estate under such decree, he may give the requisite notice of sale previous to enrolment; but to protect the title of the purchaser, the party for whose benefit the sale is made must cause the decree to be enrolled, and produce a certificate thereof before any conveyance can be executed by the master and where any previous decree or decretal order disposes of any part of the merits of the cause or is neccessary to explain the final decree, it must either be recited therein, or enrolled therewith, as a part of the final decree in the cause. After thirty days from a final decre entered in the minutes if no appeal or rehearing, the register, assistant register or clerk, by whom the decree was entered, must on being required by either party, attach together the bill, pleadings and other papers filed in the cause, together with the taxed bill of costs, and annex a fair engrossed copy of the decretal order of the chancellor or vice-chancellor rendering the decree, signed by him, and countersigned by the register, assistant register or clerk, who entered it. The same being then filed in his office, remains of record, and such filing will be deemed an enrolment of the decree and proceedings, with the like effect as was formerly given to enrolled decrees. Upon request also of any party, the register, &c. must enter and preserve in an alphabetical docket, all final decrees so filed and enrolled, directing the payment of any debt, damages, costs, or other sum of money. Upon like request, and payment of fees for docketing the decree, and for making and sending transcripts as presently mentioned, the register, &c. must enter in such docket a statement of the decree, containing the names at length of all the parties, their residence, title, trade or profession, if any such be stated in the proceedings; the amount of the debt, damages, costs or other money directed to be paid, and the hour and day of entering the docket: such statement must be repeated under the name of each person against whom the decree was rendered, in the alphabetical order of their names. The register, &c. entering such docket must immediately transmit a certified transcript of it to each of the clerks of the supreme court, who must on receipt thereof immediately enter the transcripts with their dockets of judgments in the supreme court, and in the

(1) 2 R. S. 182. § 104. R. 111. (2) R. 111, 6 J. Ch. 75.

same manner, except that they must designate in the margin of the entry that the same is made of a decree in the court of chancery.(3) Every such final decree hereafter for payment of debt, damages, costs or sum of money, will bind the real estate or chattels real of every person, against whom the decree was rendered, from the time of the docketing of the decree by the register, &c. But the lien will cease in ten years, in favour of bona fide purchasers, and subsequent incumbrancers,(4) and in twenty years as between parties and privies from the presumption of payment; [post § 85.] but may be discharged on satisfaction, by execution or otherwise, as presently mentioned.(5)

§ 84. Execution & process, to enforce performance of decretal orders and decrees.

This court has power to issue all process to carry its decrees into effectual execution.(6) This may be done by execution against the body, or against the goods and chattels; in default thereof, the lands and tenements. But no process can issue on a final decree until enrolment.[§ 83](7) We have seen that real estate is bound from the docket of the decree [ante § 83.] Goods and chattels are bound by execution from the time it is delivered to execute;(8) but not as against a purchaser without notice until actual levy.(9) If there be several executions, or one or more executions, and one or more attachments, the first delivered has preference, notwithstanding a levy may be first made under another; but if so levied, and a sale of any goods and chattels before actual levy under the execution first delivered, the goods and chattels cannot then be levied upon by the first.(10) Process of execution, as well as all process out of the court of chancery, must be in such form expressive of the intent as the chancellor shall establish.(11) Every such process shall be sealed with one of the seals of the court, and when from its nature it requires to be executed by the sheriff, it must be directed to him.

(3) 2 R. S. 181-2. § 91-6.
(4) ib. § 96-7. but the lien does not extend to contracts for purchase of land, post § 85. see further as to liens. 2 R. S. 365. &c.
(5) § 85.
(6) 1 Hopk. 231.
(7) 2 R. S. 183. § 104.
(8) ib. 365.
(9) 2 R. S. 183. 366. 2 J. Ch. 284.
(10) 2 R. S 366.
(11) 2 R. S. 178-9.

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1 Process of execution *against the body;* attachment; order for commitment, ca. sa. &c.

Interlocutory orders are enforced by attachment or order in the nature of a warrant for commitment after personal service [see § 7. of order] of the prior order or papers on which the attachment or order of committal is founded.(12) Interlocutory costs are enforced in that manner. [see § 21] On decretal orders and final decrees a capias ad satisfaciendum for costs may issue on dismissal of the cause for want of prosecution, or on hearing.(13) If there be a specific duty to be performed, a writ of execution in the nature of a ca. sa. to compel the performance, may issue.(14) If on service of this execution the duty be not performed, the court on affidavit(15) of service may make an order that the party be committed, or he may be proceeded against by attachment or process of contempt.(16)

Against the goods & chattels lands and tenements, as to what property is liable to satisfy decree, exemptions from seizure and duties of sheriff on fi. fa. & ca. sa. 2 R. S. 263. 426. 644.

Where costs are decreed on dismissal, a fieri facias may issue.(17) Where a sum is decreed to be paid with or without costs, a writ of execution in the nature of a fi. fa. may issue;(18) and a testatum fi. fa. for the residue.(19) If the cause has been appealed and affirmed, a fi. fa. for the sum decreed and costs after affirmance issues.(20) If the object be to obtain possession of lands pursuant to the deree, this is effected by a writ of assistance,(21) which in ordinary cases is the first and only process for giving possession of land under an adjudication of this court.(22) But this it seems is where the decree is expressly given for possession. Though it is said that when the delivery is made a part of the decree, a writ of execution is the proper remedy in case of disobedience.(23)

(12) Rules appx. No. 2. attachment ib. No. 10. "Precept to commit a party to prison for non payment of interlocutory costs." See Bla. 168. See 2 J. Ch. 505. as to attachment to enforce a purchase made on master's sale.

(13) Ib. No. 8. "ca. sa. for costs on dismissal of bill," which with a little variation may be applied to petition causes.

(14) See ib. No. 4.

(15) Form of affidavit of service of writ of execution by showing it to defendant's solicitor. Bla. 37. appx.

(16) See Bla 168. Eq Draft. 614-15. Hab. Corp. to bring him from prison to answer contempt. ib. Bla. 60. appx. order on petition or motion that defendant stand committed to prison till he perform decree. ib.

(17) Ib. form No. 7.

(18) See ib. form of the fi. fa. &c. No. 5.

(19) Ib. form of No. 6.

(20) Ib. No. 9. fi. fa. &c. after affirmance by court of errors.

(21) Form Ch. rules, appx. No. 1. See former rules of the equity court, p. 56-7. to give possession to trustees, ib.

(22) 1 Hopk. 422. sed. 4 J. Ch. 609.

(23) 4 J. Ch. 609.

But where the delivery of possession is not a part of the decree, for example, as where a mortgagor or any person in possession on whom a copy of the decree for sale had been served refuses to surrender possession on demand to the purchaser on being shown the master's deed, and a different proceeding follows, viz: 1st, motion [see ante § 14] for an order requiring him to deliver possession; 2d, order, entry in register's office, &c. service of copy, [ante §33, 35] 3d, affidavit of service and refusal; 4th, order [ante § ib. 7] for an injunction;(24) 5th, service of same; 6th, affidavit of service; 7th, order for writ of assistance; 8th, writ of assistance directed to and executed by the sheriff.(25)

§ 85. Nulla bona, & final satisfaction and cancelling decree.

As the decree does not affect as lien the interest of a person holding a contract for the purchase of lands, if the execution against such person be returned unsatisfied, the execution creditor may now file a bill against such defendant, and the party bound by the contract to prevent its transfer and obtain satisfaction of the sum remaining due on such decree out of the interest of the defendant in the contract.(26) If one of several owners of land pays more than his share of the execution, he may enforce by bill filed a contribution from the others.(27) If the decree be satisfied by execution or otherwise, and the defendant wish to remove the lien, he must obtain a satisfaction of the decree to be entered, pursuant to the statute,(28) and if he shall have neglected to cause the decree to be cancelled after payment, he may on motion or petition obtain an order to discharge the same, if the court on hearing of the parties be satisfied that the decree has been paid.(29) If not thus cancelled or discharged, the lien with regard to third persons will cease in ten years, [ante § 83] and the decree as between parties and privies be presumed paid after the lapse of twenty years; but this presumption may be repelled by partial payment, or acknowledgemnt within the time.(28)

(24) Rules, appx. No. 3.
(25) See 1 Hopk. 231. 4 J. Ch. 609. See 2 R. S. 185. 191. making some new provisions as to mortgages, &c. See Bla. 168. and appx. 24. Hoff. Mr. 393–6. forms, Eq. Draft. 616–18. 596–7. Hoff. 237. 240.
(26) See 1 R. S. 744–5.
(27) See 2 R. S. 375–6.
(28) See 2 R. S. 182. § 98, 99. Fees for acknowledgment of satisfaction for entering, &c. ib. 629. 637.
(29) ib. § 100.
(30) See 2 R. S. § 300, 301.

CHAPTER III.

PRELIMINARY PROCEEDINGS.

§ 1. Who may sue in person by solicitor, and on what conditions.

Every person of *sound mind* and *full age* may appear by solicitor in any action or plea by or against him, or at his election prosecute or defend in person; but no person can appear on the record in person, whilst he has a solicitor in the cause,(1) nor commence proceedings in person until he file security for costs, in cases wherein the defendant would be entitled to security as hereafter mentioned.(2) Poor persons may have solicitors and counsel assigned for the prosecution. Testimony may be taken conditionally in contemplation of a suit. But suits cannot be sustained if the objection be raised, unless brought within a certain period, and in the names of all proper parties. The enquiries and proceedings suggested by these propositions, in behalf of persons legally qualified to prosecute in person or by solicitor, will constitute the subject of the present chapter: and the preliminary proceedings in relation to persons not thus qualified will be detailed in the next chapter.

§ 2. In person or by solicitor.

1. If a party prosecute in person he will be entitled to be recognised by the adverse party, in respect to service of papers in the manner heretofore directed. [ch. 2. § 13.] No warrant to prosecute by solicitor is necessary (3), as in England. [ch. 1. § 18.] But the solicitor for his own safety may usually receive from his client a written authority. The party himself must have authority for instituting proceedings, whether in person or by solicitor. For instance, no suit in equity can be brought by the assignees of an insolvent under certain articles of the statutes, (respecting assignments by insolvents on their and

(1) 2 R. S. 276. § 11.
(2) R. 17.
(3) Common warrants of attorney are abolished. 2 R. S. 351. 661. § 11.

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creditors' application, proceedings by creditors to compel assignments by debtors in execution, and assignments by debtor imprisoned to exonerate his person,) without consent of the creditors having a major part of the debts exhibited and allowed, unless the sum in controversy exceed 500 dollars.(4) It is a general provision by statute also, that the prosecution of any proceeding in law or equity for vexation and trouble or maliciously, in the name and without the authority of another person, or where no such person is known, incurs a forfeiture of treble damages in favour of the party proceeded against, 250 dollars to the person in whose name the proceeding was had, and imprisonment not exceeding six months, as for a misdemeanor.(5)

2. SECURITY FOR COSTS.

§ 3. Security for costs.

§ 4. What cases security may be required.

In contested petitions as well as bills, in which the prosecuting party anticipates that the defendant may rule him to file security and stay proceedings, or where the solicitor himself does not feel safe in commencing a suit on his own responsibility, it may be advisable to prepare and file security for costs; and no bill can be filed where the defendant is entitled to such security in any of the following cases until the security be filed, unless prosecuted by a solicitor,(1) who then becomes liable to the amount, and may be exonerated from his liability in the manner hereafter prescribed;—viz: where the suit is—1. For a complainant not residing within the jurisdiction of the court or for several, all non-residents. 2. For or in the name of the trustee of any debtor. 3. For or in the name of any person being insolvent, discharged from his debts, or exonerated in person from imprisonment, pursuant to any law for the collection of any debt contracted before the assignment of his estate. 4. For or in the name of any person committed in execution for a crime; or 5th, in the name of any infant whose next friend has not given

(4) 2 R. S. 42. But it has been held in England that the defendant cannot object to the bill not having been filed by the assignees of a bankrupt with the consent of creditors, unless the objection be made by the answer.(1 Simons 376.) It is also held that the power to institute a suit need not be stated in the bill, nor proved at the hearing, but the court may direct the master before proceeding in the accounts to enquire into the fact. Daniell's Rep. 141.

(5) 2 R. S. 550.

(1) R. 17.

security for costs.(2) After a suit or proceeding commenced by solicitor without previous security filed, if the plaintiff was such non-resident, trustee, assignee, imprisoned criminal, or infant, the defendant may require him to file the security.(3) And if after the commencement of the suit the plaintiff or all the plaintiffs become non-resident, insolvent, discharged or exonerated as described, or sentenced to state prison for any term less than life, the defendant may also require the security.(4)

§ 5. How given & perfected.

The order to file security and to stay all proceedings of the plaintiff, until security be filed and the sureties justify if excepted to, may be obtained upon due proof by affidavit of the facts entitling the defendant thereto.(5) The security must be a bond in a penalty of at least 250 dollars, with one or more sufficient sureties to the defendant, conditioned to pay on demand all costs that may be awarded to him in the suit.(6) It is filed with the register, assistant-register or clerk, and notice given to the defendant or his solicitor, who within twenty days after notice may except to the sufficiency of the sureties, by giving notice of such exception to the plaintiff's solicitor.(7) Within twenty days after this notice, the sureties must justify, by affidavit, that they are worth double the penalty of the bond, over and above all debts, of which affidavit a copy must be served on defendant or his solicitor. Such justification will operate to discharge the order to stay proceedings.(8)

§ 6. Solicitor's liability.

In the cases in which the defendant at the commencement of a suit would be entitled to require the security, the solicitor for plaintiff becomes liable for costs to an amount not exceeding $100, until security be thus filed, whether the security has been required by defendant or not.(9) But the solicitor may relieve himself from his liability by filing security, and the sureties justifying, if excepted to, as directed, without being required to do so by the defendant, and by giving notice thereof to the defendant or his solicitor.(10)

(2) 2 R. S. 620.
(3) See ib. and R. 17. See 1 Hopk. 117. 1 J. Ch. 202. As to non-resident suing as *administrator*. 3 J. Ch. 520. sed vide 2 R. S. 618.
(4) 2 R. S. 620.
(5) ib. § 5. vid. ante ch. 2. § 12.
(6) R. S. ib. § 4. see 1 J. Ch. 202. *post* ch. 8.
(7) R. S. ib. § 5.
(8) ib. § 6.
(9) ib. § 7. See 1 Hopk. 117.
(10) R. S. ib. § 8.

CHAP. III.

3. POOR PERSONS.

§ 7. Who may sue as a poor person.

Every poor person not of ability to sue having a cause of action, may petition the court in which the suit is depending or intended to be brought, for leave to prosecute as a poor person, and to have counsel and solicitor assigned to conduct his suit.(11) But no person will be permitted to prosecute in chancery as a poor person, in any case where the defendant is entitled to security for costs, except the complainant be an infant, and a resident of this state.(12)

§ 8. The petition.

In addition to the formal requisites of petitions, [see ch. 2. § 3. 5, &c.] this petition must state the nature of the suit brought, or intended to be; that the applicant is not worth twenty dollars, excepting the wearing apparel and furniture necessary for himself and family, and excepting the subject matter of the action, when not in possession thereof. The petition must be verified by his own affidavit, and supported by a certificate of a counsellor of the court, that he has examined the claim, and is of opinion that such poor person has a good cause of action.(13)

§ 9. Proceedings thereon.

The petition being prepared and verified, [ch. 2. § 7.] is presented ex parte on a regular motion day, [ib. § 15.] to the chancellor, or a vice-chancellor, [ib. § 14.] and if in a suit already commenced, the opposite party, if he has appeared,(14) would be entitled to service of copies and the usual notice of presenting the same. [ib. § 10--14.] On presenting the petition, an order may be entered, [ch. 2. § 33] referring it to a master to examine into the circumstances of the case, and to report whether in his opinion the petitioner has a meritorious cause of action cognizable in this court, and has not in his possession, or within his power or control, sufficient property or other means, over and above the wearing apparel and furniture actually necessary for himself and family, to pay the ordinary taxable fees of the officers of this court.(15) The order being entered, and a

(11) 2 R. S. 444-5. § 1. 6.
(12) R. 142.
(13) R. S. ib. § 2. 6. In England the application is also on affidavit of the petitioner himself, (3 Bro. C. C. 272.) that he is not worth more than 5*l.* (sed vide 11 Ves. 49.) and on certificate of counsel. The order thereon is of course. Grant 238-9. Harr. 389-90. See Blake 457. 44. appx. Eq. Draft. 589.
(14) 1 Paige 39.
(15) R. 141. 2 R. S. 445.

certified copy served on the master, [ch. 2. § 35.] proceedings before him are conducted as heretofore directed. [ch. 2. § 35, &c.] These applications to prosecute or defend in forma pauperis, are not favoured,(16) and the master should receive satisfactory testimony that the person is really what the law intended he must be if allowed this privilege. But as the principle upon which paupers are entitled to the assistance of the bar, and have equal claims with the opulent upon the court is, that they may have justice; if the master is satisfied that the petitioner is entitled to prosecute as a poor person, and has reasonable grounds for bringing a suit in this court, he must report the names of suitable persons to be assigned as the solicitor and counsel for that purpose, having regard to the interest of the petitioner, and the faithful prosecution of his suit alone in making the selection.(17) On the coming in of the report, the court may admit the petitioner to prosecute his suit as a poor person, by the solicitor and counsel selected by the master, and assigned to him by the court.(18) An order to that effect is then entered in the office, where the report is filed, and a certified copy may be taken out for the solicitor and counsel assigned.

Every poor person so admitted is exempted from payment of fees and costs, whether his bill be dismissed, or a decree be given against him.(19) Neither the solicitor, or counsel assigned, or any other officer of the court, can demand or receive any fee or reward, or take or accept any gift or gratuity from such poor person, for any services rendered for him in such suit, unless by the special permission of the court upon pain of contempt.(20) But the court, though always tender in dispaupering a plaintiff,(21) may, in its discretion, annul the order, if the person so prosecuting be guilty of any improper conduct in the prosecution of his suit, or any wilful or unnecessary delay; and he will thereafter be deprived of all the privileges conferred by such order.(22)

§ 10. Annulling the order or dispaupering.

(16) 1 Paige 39, 40.
(17) R. 141.
(18) R. 141. See order, Eq. Draft, 590-1. English practice.
(19) 2 R. S. 445. § 4.
(20) R. 142. See 1 Carr. & Pa. (N. P.) 533.
(21) 13 Ves. 511.
(22) R. S. ib. § 5.

CHAP. III.

4. TESTIMONY DE BENE ESSE.

§ 11. Proceedings to take and perpetuate testimony conditionally.

Previously to the statutes which will be presently cited, the taking and perpetuating testimony de bene esse seems to have been confined to suits actually pending, when on motion or petition, founded on affidavit and due notice,(1) or without notice where the witness was about to depart the state to reside permanently abroad;(2) his testimony might be ordered conditionally. This may be still done in suits pending, and commissions may be directed by the chancellor or a vice-chancellor, register, assistant register, or clerk, under regulations by the chancellor for examination of witnesses in the manner hereafter described. There must have been some special reason for the application, as that the witness was about leaving the state, the only witness sick, aged, infirm, or his death apprehended; though, in a matter of great importance, it would, if justice required, be granted without regard to age or infirmity.(3) The testimony so taken was and still is an incident to every suit in its progress, but was confined to the matter controverted, and differed from that *in perpetuam rei memoriam*, the result of a suit instituted purposely. For where there was reason to fear that facts, which might become the subject of future controversy, would be lost by death or absence, and no action could be immediately brought; where it was desirable, for instance, to perpetuate testimony as to the boundaries of two adjoining manors; as to title to property in possession, threatened with disturbance by one pretending a right, or in relation to deeds, wills, marriages, births, and some other matters, it was and still may be, in cases not provided for by the statutes, necessary to file a bill for that purpose.(5) By a former statute of 1813,(6) testimony relative to the *title to land*, might have been taken de bene esse, before a master in chancery, and in the manner therein directed.

By the revised statutes, in relation to proceedings to perpetuate testimony,(7) any person, a party in a suit

(1) 2 J. Ch. 146. Bla. 152-4. 33-4. 46. appx. 48. appx. Eq. Draft. 588. 4 Bro. C. C. 540.
(2) 4 J. Ch 165. see also 13. Ves. 261. 5 Madd. 364.
(3) 8 Ves. 3. 13 Ves. 261. 3 P. W. 77. Harr. 52. 111. 113.
(7) 2 R. S. 398.

§ 12. Affidavit and order thereupon, summons and service on witness.

pending in any court of the state, or *who expects to be a party in any suit about to be commenced*, may cause *the testimony of any witness material in prosecution or defence* to be taken conditionally, and to be perpetuated.(8) Upon producing to a master in chancery (or to a justice of the supreme court or any officer authorised to perform duties of such justice at chambers, or to a first judge) *due proof by affidavit that the applicant* is a party to a suit pending in some court of record in the state, or *has good reason to expect to be made a party* to such suit; that *the testimony* of any witness in this state is *material* and *necessary* to the *prosecution* or *defence*, and if such suit be not actually commenced, *that the party* expected to be *adverse* to the application *resides within this state*, and is of *full age*, such officer will appoint a place within the county where such witness resides, and a time not less than fourteen days from the date of the order for the examination of such witness.(9) The officer then issues a summons to the witness designated in the affidavit, requiring him to appear and testify at the time and place appointed.(10) This, as in other cases, is served by showing to the witness the original, delivering a copy, or a ticket containing its substance, and paying or tendering the fees allowed by law for travelling to and returning from the place where he is required to attend, and the fee allowed for one day's attendance.(11) If the person so summoned fail to attend, without a reasonable excuse, he is responsible for all damage, and forfeits to the aggrieved party fifty dollars.(12) The officer upon due proof of service of summons and failure of the witness to attend, issues his warrant to the sheriff of the county to apprehend such witness, and bring him before the officer to be examined.(13)

§ 13. Service of order on party.

After satisfactory evidence given to the officer that the order also, directing such examination, has been duly served on the party to such suit, if one be pending, or on the persons named in the original affidavit as expected parties, if no suit be pending; at least ten days

(8) ib. § 33. see former analogous practice and forms in supreme court, 7 Cowen 60-3 Caines Prac. 433-8.
(9) ib. § 34. vid. 1 Cowen 586. as to affidavit under the old law.
(10) ib. § 35.
(11) ib. p. 401. § 44.
(12) ib. § 45.
(13) See ib. § 46-49.

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§ 14. Taking the testimony, filing depositions, &c.

before the time therein appointed for such examination, he will proceed on the day appointed, and such other days to which the matter may be from time to time adjourned as may be necessary, to take the deposition of the witness, conditionally.(14) If the witness attend and refuse without reasonable cause to be examined or answer any legal question, or sign the deposition, he may be committed till he comply, by warrant expressing the precise ground of commitment.(15) The officer must insert in the deposition every answer or declaration of the witness, which either party may require to be included. The depositions when completed must be carefully read to, and subscribed by, the witness, certified by the officer, and within ten days filed in the office of the clerk of the county in which the same was taken, together with the original order for the examination, the affidavits on which the same was founded, and those proving the service of such order.(16) Any officer to whom application is made may order the examination to be made before any other authorised officer in the same county, who shall proceed as if the order for examination had been made by him.(17)

§ 15. The effect as to weight of evidence and how depositions used de bene esse.

The original affidavit filed with such deposition or a certified copy thereof, will be presumptive evidence of the facts therein contained, to show a compliance with the provisions of the statute.(18) The deposition or certified copy may, on any trial between the persons named in the original affidavit as parties, or expected parties, or persons claiming under them, be given in evidence by either party, upon due proof of the death, insanity, or inability of the witness to attend trial by reason of old age, sickness or settled infirmity.(19) The depositions so taken and read in evidence will have the same effect, and no other, as the oral testimony of the witness would have, if given on such trial; and every objection to the competency or credibility of the witness, or relevancy of any question put to him, or of any answer given by him, may be made in the same manner as if such witness were personally examined on such trial.(20)

(14) ib. 399. § 36.
(15) ib. 401. § 47, 48.
(16) ib 399. § 37. what copies of depositions taxable. 2 Cowen 584.
(17) ib. § 41.
(18) ib. § 38.
(19) ib. § 39.
(20) ib. § 40.

5. LIMITATION.

§ 16.

When or within what time must a suit be commenced in equity.

In all causes of action where the jurisdiction is concurrent with courts of common law, the same statutory limitation applies to equity, but such limitation will not extend to a subject matter over which equity has peculiar and exclusive jurisdiction.(2) Bills for relief on the ground of fraud must be filed within six years after the discovery by the aggrieved party of the facts constituting such fraud, and not after.(3) Bills for relief in case of the existence of a trust not cognizable by courts of common law, and in all other cases not herein provided for, must be filed within ten years after the cause thereof shall accrue.(4) But if the party be under the legal disability mentioned in the statute,(5) the period of such disability is excepted from the limitation in the two preceding sections, and in case of death of a person entitled either before the time was out or during the disability, the bill may be filed by the heirs or representatives within the time allowed in the statute,(6) for bringing suits at law in the like cases.(7) Previously to the limitation thus defined by statute, it was decided that the statute of limitations was a good plea in bar in equity as well as at law, and in analogous cases received the same construction and application,(8) that the construction extended also to the *proviso* in relation to the disability of parties,(9) and to the *exception*, in relation to "a trade of merchandize between merchant and merchant, their factors or servants,"(10) that the time of limitation depended on the *lex fori*, not *lex loci*, &c.(11) and where the statute began to run it continued,(12) but that an unqualified acknowledgment, or partial payment as tantamount, of a subsisting debt made by the party himself would take the case out of the statute.(13)

(2) 2 R. S. 301. 292. § 49, 50. See decisions concurrent. 6 J. Ch. 266. 7 J. Ch. 90. 127. and 1 Johns. Dig. 303.
(3) ib. § 51.
(4) ib. § 52. See former decisions *contra* and explanatory. 3 J. Ch. 384. 190. 216. 5 J. Ch. 522. 7 J. Ch. 90. 127. 6 J. Ch. 266. 20 J. 576. 5 J. Ch. 522.
(5) viz. in 1st and 2d articles of tit. 2. ch. iv. 2 R. S. 295, 296, 297.
(6) viz. in the 1st and 2d art. ib.
(7) R. S. ib. 302. § 53. See 6 J. Ch. 360. 3 J. Ch. 129.
(8) 7 J. Ch. 90. 1 Paige 100-1.—1 J. Ch. 313. 10 Wheat. 176.
(9) 3 J. Ch. 129.
(10) 20 J. 576. in error. S. C. contra 5 J. Ch. 522. But see 1 Johns. Dig. 302.
(11) 3 J. Ch. 190.
(12) 6 J. Ch. 360. sed vide. 5 J. Ch. 522.
(13) 6 J. Ch. 266. vid. 360.

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6. PARTIES.

§ 17.

Parties. General rule.

It is a general object of equity to prevent a multiplicity of suits, by determining in one the rights of all persons legally and beneficially interested in the subject. It is a general rule, therefore, that all persons who are materially interested in the event of a suit, however numerous, must be made parties,(1) that the court may do complete justice, decide and settle the rights of all interested, and that its orders may be safely executed by those who are compelled to obey them, and future litigations prevented.(2) But it is also a general, rule that distinct claims and defences, matters independent leading to distinct issues and decrees, cannot be joined; hence several complainants in one bill cannot sue one defendant for several distinct and unconnected matters, nor one complainant sue several defendants in the same bill for distinct matters.(3) But pursuant to the leading object mentioned, all persons having one connected interest centering in one point in the issue, or a community of interest tending to one common object of litigation, may join: and matters apparently distinct and multifarious, but in reality forming a connected series of acts of the same nature, tending to the same injury, and in which all the defendants were more or less concerned, though not jointly in each act, may be joined.(4) The interest required by the general rule must be *material*, but the rule is confined to parties to the interest involved in the issue, and who must necessarily be effected by the decree.(5) The interest is not understood in England as extending in many cases to all persons who may be consequentially interested; as where a single creditor seeks satisfaction of his single demand from the personal assets of a deceased debtor, the interest of every other unsatisfied creditor though consequentially af-

(1) See 7 J. Ch. 211. 5 J. Ch. 196. 6 J. Ch. 450. 1 Paige 166. See further as to parties, Revised Statutes.

(2) Milford Pl. (by Jeremy) 163 4.

(3) Vid. 6 J. Ch. 163. 1 J. Ch. 305. 4 Cowen 682-3. 4 J. Ch. 199. vid. 7 J. Ch. 214.

(4) 4 Cowen 682-3, &c. 6 J. Ch. 139. 151. 1 Hopk. 416. 1 Marsh. 484.

(5) 3 J. Cas. 311. vid. 7 J. Ch. 211. J. Ch. 242-7. See 16 Ves. 327. 1 J. Ch. 434. 437. 2 J. Ch. 283. 10 Wheat. 168. 2 J. Ch. 197.—4 Cowen 717. 3 Desau. 590. 3 Cranch 220. 3 P. W. 311. 11 Ves. 429.

fected by the suit, is not deemed such as to require they should be parties, notwithstanding the decree fairly obtained compels them to admit the demand ascertained under its authority as just to the extent allowed by the court in the administration of assets; but they are not bound by any account of the assets taken under such a decree.(6) Though it is an established principle in equity not to decree finally until all the proper parties are before the court,(7) yet if sufficient privity exist between those in court, so that a complete decree can be made; or if the merits as between them can be decided, and no objection be made in season for the want of some parties who are interested, the court may decree as between the former, and the decree will remain inoperative as to the latter, for none but parties or privies are bound by a decree.(8) Thus, though it is a rule that in foreclosures, but not in partition,(9) all incumbrancers whether prior or subsequent, excepting those *pendente lite*,(10) must be made parties,(11) yet if not, and no objection raised, the decree may be made without them. In those cases they are passive; but when necessarily active to the execution of the decree, they must be brought in, either by service of process, or in the mode authorised by the legislature in proceedings against non-resident, absent, or concealed debtors, as hereafter described. [ch. 7.]

§18. Modifications and exceptions to the rule.

The rule itself requiring all persons to be made parties whose interest is involved in the issue, and may be affected by the decree is one of convenience merely, and may be dispensed with when it becomes extremely difficult or inconvenient.(12)

(6) Mitf. 170-1. and authorities cited. Here the creditor seeking sale of *real*, showed judgment at law creating a lien, if distribution of *personals*, an execution pursued to the extent. (4 J. Ch. 671. 682. 687. See 20 J. 554.) A judgment credtior by legal diligence acquired a legal preference (20 J. 554. vid. 4 J. Ch. 329.) to the assistance of chancery, in the distribution of the assets, (4 J. Ch. 687. See also 14 J. 446.) But on a devise in trust for creditors, chancery would enjoin a suit by one striving for preference. (4 J. Ch. 651.) Now, by the Revised Statutes certain preferences are abolished; and no judgment obtained against executors or administrators entitles the debt to any preference over others of the same class. (2 R S. 87. See further as to assets, distribution, &c. ib. 82. &c. 86. &c. 91. 99. 451.

(7) 9 J. 442.

(8) 1 Marsh. 446. 2 Bro. C. C. 276. 1 Eq. Ca. Ab. 74. 1 Sch. & Lef. 240. 1 Grant 30.

(9) 1 Hopk. 501. 7 J. Ch. 140.

(10) 5 J. Ch. 94.

(11) Vide 4 J. Ch. 605. 3 J. Ch. 459. vid. 12 Ves. 58. 3 Ves. 314.

(12) See authorities, ante under (5)

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Where the persons having the same interest are numerous, and their interest may be sufficiently represented, either by individuals with delegated authority, or by one or more of the parties in interest, in behalf of themselves and all others, these alone have been admitted.(13) Thus in England, the acting commissioners where the number was numerous, appointed under public authority, and the committees of legal bodies acting by committee, were made parties. So when a bill was filed to establish a right at law, as where a person having at law a general right to demand services from the individuals of a larger district, to his mill for instance, the court has required so many that it can justly be said they will fairly and honestly try the legal right between themselves, all others interested, and the plaintiff.(14) Though a nominal trustee must unite with a cestui que trust in a suit,(15) yet trustees of property conveyed to them, and mortgaged by them, though raised by a joint fund of 500 subscribers, were held, on foreclosure, to represent sufficiently the interest to be made sole parties defendants.(16) So one creditor or legatee, except a residuary legatee, may sue in behalf of himself and all others who may come in under the decree.(17) But the bill must state the fact that it is filed in behalf of the complainant and all others, &c.(18) So where all the inhabitants of a parish in England had rights of common under a trust, a suit by one on behalf of himself and the other inhabitants was admitted.(19) The necessity of the case has induced the court in many other instances to depart from the general rule, and to allow a few persons to sue on behalf of great numbers having the same interest; but it seems, except perhaps in the common cases of this kind, it is necessary to allege that the parties are too numerous to be individually named, and that where it is attempted to proceed against some individuals representing a numerous class, it must be alleged that the suit is brought against them in such

(13) Vid. 5. J. Ch. 197. 1 Sim. and Stu. 106. 1 Jac. and Walk. 358. 1 Russel 441. 1 Swans. 265. 2 Sim. and Stu. 18, 19. 267.
(14) 16 Ves. 327, 328. 13 Ves. 542. 11 Ves. 444-5. 429 1 Swans. 265.
(15) 2 J. Ch. 238. 1 Paige 20.
(16) 2 J. Ch. 197. vid. 1 Sim. and Stu. 105. 106.
(17) J. Ch. 283. 4 Cowen 602-3. &c. 3 J. Ch. 553. see 1 J. Ch. 437. sed, 4 J. Ch. 199. Davoue v. Fanning.
(18) 1 Paige 20.
(19) 1 Ca. in Cha. 269. 2 Sim. and Stu. c. Mitf. 168.

representative character.(20) So also the want of proper parties is not a good plea, if the bill suggests a sufficient reason for not making other parties, as if it seek for a discovery of the parties interested, in the matter in question for the purpose of making them parties and charge that they are unknown; if a personal representative is a necessary party, and the representation is charged to be in litigation; if the parties are out of the jurisdiction of the court, and the fact be charged in the bill; in which also it is usual to add the name of the parties so far as to connect their case with the other parties, and it may pray process in case he should become amenable thereto. The court will, if the fact be so stated or admitted by defendants, or proved at the hearing, proceed without him against the other parties, as far as circumstances permit; and if the disposition of the property be in the power of the other parties, the court will, it seems, act upon it. But if the party become amenable pending the suit, he must be brought in, by process if prayed for, or by amendment if in season, or by supplement. For if a person interested be forth coming, and can be made a party, the rule is universal not to allow an account to be taken in his absence.(21)

Where the interest has been changed by death, act of party or operation of law, the survivors where the interest survives, or the legal representatives of the interest or property of the deceased, in the first case, and the assignees, trustees, or purchasers in the latter, must be made parties.(22) But this rule also has its modifications.(23) It has been held in England, that in most cases the person having the legal title in the subject must be a party, though he has no beneficial interest, so that the legal right may be bound by the decree; and hence if a bond or judgment be assigned, the assignor, as well as the assignee, must be a party, for the legal

(20) 5 Madd. 13. 2 Sim. and Stu. 91. c. Mitf. 270. n.

(21) 3 Cranch 220. 2 Atk. 510. 51. Prac. Cha. 83. 2 Sim. and Stu. 219. 12. Ves. 48. 53. Mitf. 164. 180. 6 J. Ch 450.

(22) See. 6 J. Ch. 1. 21. 398. 450. 255. 4 J. Ch. 116. 4 J. Cas. 549. 7 J. Ch. 144. 3 J. Cas. 311. 322. 1 J. Ch. 85. 437. 3 J. 543. 1 J. Ch. 337. 2 J. Ch. 394. 305. 1 Paige, 166. 10 Wheat. 384.

(23) See. 6 J. Ch. 1. 21. 5. J. Ch. 89. 649. 3 J. Ch. 322. 1 J. Ch. 437.

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right of action remains in the assignor.(24) It has been decided here, however, that though on a bill to redeem a mortgage, the assignees of the mortgagee and purchasers under him must be made parties;(25) yet where there has been an *absolute* assignment, the mortgagee in that case, or in a foreclosure and sale, need not be a party, for the assignee standing in his place may be decreed to convey.(26) Where the interest remains in the original parties, the suit must be in their names; and to a bill founded on a contract, the parties to the contract are in general the only necessary parties.(27) But it is unnecessary to make the drawer of a bill of exchange lost, a party to a bill filed against the acceptor.(28) Counties are made parties in the name of the board of supervisors; towns by their names;(29) corporations by their title; and if any of their officers are to be called upon to answer; they must be individually joined.(24) It will appear in the next chapter, and subsequently that in cases of legal disability, the name of a next friend or guardian must be united in the prosecution or defence. But a lunatic is fully represented by his committee and need not be a party complainant(25) or defendant.(26) This brief and general view of the theory in relation to parties is all that is deemed admissible in the present treatise. But the subject was too closely blended with the practice to be entirely excluded. [see ch. 1. § 8.]

§ 19. Searches for parties and documents.

In order to ascertain all the parties in interest, it may frequently become necessary to direct an examination of the records of the following offices, and obtain the certificates of the clerk or other officer, viz: For judgements, the supreme court, superior court of the city of New-York, common pleas and district clerk's office of the district and circuit court of the United States; for decrees, the register or assistant register's office, or the transcript docket of decrees kept by the clerks of the supreme court for docket of decrees now a lien; the regis-

(24) Mitf. 179. citing. 1 Ves. jr. 463. but see. 2 Atk. 235. 3 Ansts. 651. 3 Madd. 174. 6 Madd. 165. 2 Sim. and Stu. 253.
(25) 3 J. Ch. 311.
(26) 7 J. Ch. 144.
(27) 1 Jacob, 75.
(28) 4 Psice, 176.
(29) 2 R. S. 473. 1 ib: 356. 384.
(24) 1 J. Ch. 366. see. 4 J. Ch. 370.
(25) 7 J. Ch. 139. This was a bill to set aside a contract alleged to have been made by the lunatic under mental disability.
(26) 2 J. Ch. 242. 400.

ter of the city and county of New-York, or clerk of other counties, for deeds and mortgages; the loan office, or the transcript kept by the clerk of the county, for mortgages for loans; the secretary of state's office for the like purpose; the collectors for assessments and taxes; the surrogates office for lists of guardians, executors and administrators, heirs and devisees—or it may be necessary to obtain from those public offices copies of wills, deeds, patents, or other document, to annex or set forth in the bill or petition. All necessary disbursements for these objects being taxable.(27)

(27) ante ch. 2. § 81.

CHAPTER IV.

PRELIMINARY PROCEEDINGS.

§ 1 Prosecuting by next friend committee, &c.

PERSONS not of *sound mind* or *full age* [ch. 3. § 1.] cannot appeal by solicitor or in person. They have no legal assent, and must prosecute by next friend under the authority of the court. Committees for lunatics &c. and the general guardian of an infant, are preferred as the next friend, to prosecute, unless they refuse or neglect to give additional security, or it be for the benefit of the infant that he be represented by some other person.

I. NEXT FRIEND.

§ 2. Infants.

Before any process be issued or bill filed in the name of an infant, sole plaintiff in any suit, a competent and responsible person must be appointed to appear as next friend in such suit, who shall be responsible for costs;(1) and who, if the infant be liable to file security for costs [ch. 3. § 3.] must file the security if he prosecute in person, before suit brought, unless the infant prosecute as a poor person; [ch. 3. § 7.] in which case the petition for the appointment of a next friend may be blended with an application to sue as a poor person.[ib.] The appointment must be made by the chancellor, a vice-chancellor, or any master,(2) on the petition[ch. 2. § 3. 5, &c.] of the infant, with a written consent of the next friend, duly acknowledged before, or proved to the officer making the appointment.(4) This is presented, if to the chancellor or a vice-chancellor, on a regular motion day; or if laid before a master, he will proceed to enquire, approve the sureties, and take and file the requisite bond as presently described; and his order for the appoint-

§ 3. By whom petition, and proceedings.

(1) See 2 R. S. 446. § 2 and § 1. 7. See Cowen 236.
(2) R. S. ib. § 3.
(4) R. S. ib. § 4.

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ment is then filed with the register, assistant register, or clerk of the court.

§ 4. Bond by next friend.

Before any person be so appointed on any suit to recover any debt or damages, he must, if required by the officer, execute a bond to such infant in a penalty of at least double the amount claimed, with sureties, to be approved by the officer, conditioned that such next friend shall duly account to the infant for all moneys recovered in such suit.(5) No next friend of an infant complainant, unless he give such security, can receive any money or property awarded in the suit, except such costs and expenses as may be recovered by the infant in the suit.(6) The bond must be delivered to the officer, before the appointment be made, and filed by him in the office of the surrogate of the county in which the infant resides; such officer being entitled to demand from the next friend the fee allowed the surrogate for filing the bond, to be paid by him.(7)

§ 5. Order for appointment & other proceedings.

The order for the appointment must be filed in the office of a clerk of the court, before any bill filed in the cause.(8) Previously to the above regulations, suits were permitted in behalf of infants without their consent, and by any one beside relations. But if the next friend who was liable for the costs, was not of sufficient ability, the defendant before answer might move for security, or that another be substituted.(9) As another check upon the general license to sue for infants, on a representation that the suit was not for their benefit, an enquiry would be directed, and on report of a master to that effect, the court would stay proceedings. But a motion, to stay a suit commenced in the name of infants for accounts of their property, upon affidavits representing that the suit was not for their benefit, was refused, the court expressing a doubt, if the bill be proper in its contents, whether defendants could come here by motion to stay the suit, upon statements of surveyors or accountants that it is not necessary.(10) If two suits are instituted for the same purpose, in the name of the infant, by different persons acting as his next friend, the court will direct also an inquiry

(5) ib. § 5.
(6) R. 147.
(7) ib. § 6.
(8) ib. § 7.
(9) Mitf. Pl. 25. &c. 4 Madd. 461. 1 Sim. & Stu. 264. and other cases cited. Sed vid. 2 Dick. 763. 1 Cox. 286.
(10) 1 Jacob 259.

which suit is most for his benefit, and when that point is ascertained, stay proceedings in the other. But it seems an application for this purpose should not be made except in a strong case.(12) And after a decree in one of two suits commenced in the name of an infant, it is not usual to refer it to the master to enquire which suit is most beneficial. But under the circumstances the next friend in the suit in which a decree had been made was removed, and the next friend in the other suit substituted for him.(13)

The court will remove a next friend, and appoint a new one where the former is so connected with a defendant, having an interest adverse to that of the infants, as to make it probable that their interest will not be properly protected by him.(14) Persons incapable of acting for themselves, though not idiots, lunatics or infants, have been permitted to sue by their next friend;(15) such as persons deaf and dumb, or superannuated. Where a person has religious scruples against being a party to a suit, it seems on affidavit to that effect, or report of a master, a next friend might be allowed.(16)

§ 6. Other cases

§ 7. Married woman.

A married woman, being under the disability of coverture, cannot sue alone, unless she is legally authorised to act as a feme sole. Her husband is usually joined in suits respecting her rights. But when she claims rights in opposition to those claimed by him, as she cannot sue under his protection, she must seek other protection, and the bill must be exhibited in her name by her next friend.(17) A bill for a divorce dissolving the marriage contract, may be exhibited by a wife in her own name, as well as by a husband.(18) But no bill can be filed in her name to obtain a sentence of nullity declaring void the marriage contract, or to obtain a decree for a separation or limited divorce, unless the suit be prosecuted by a responsible person as the next friend of the complainant, who shall be responsible to the defendant for such costs as may be awarded by the court, if it appear that the suit was commenced without any reasonable or justifiable cause.(19)

(12) Mitf. 27. and 6 Madd. 97.
(13) 1 Jacob 527.
(14) 1 Simons 390.
(15) Mitf. Pl. 30.
(16) 2 J. Ch. 238.
(17) Mitf. 28.
(18) 2 R. S. 144.
(19) R. 163. See 2 R. S. 141. 146. 144. 1 J. Ch. 606. 2 J. Ch. 224. 1 Hopk. 117.

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any part, &c. during his lunacy, &c. and the ages and number of heirs, &c. that the commissioners give notice to the party or his trustee, &c. and return the inquisition with the writ. And further, commanding that the sheriff cause to come before them a jury to enquire, &c. Where the proceedings are, as is usual, conducted by a solicitor, he prepares and serves all papers, obtaining the commissioner's signature and sanction to precipes, summonses, &c. and when the day arrives gives notice to them to attend to the execution of the writ. But if the commissioners execute the writ, it is, after being sealed, delivered to one of them with notice to the others. A precipe(9) is issued in the nature of a venire facias to the sheriff to summon a jury to appear at the time and place specified, to enquire, &c. and is delivered to the sheriff. This is usually prepared by the solicitor when the commissioners conduct the subsequent proceedings; and instructions(10) to them, as to the mode of executing the commission, are also made out. The sheriff makes return(11) of the execution of the precipe by referring to a panel of not less than twelve and not over twenty-four jurors, names annexed. The commissioners may under hand and seal issue a warrant,(12) directed to any one who has the custody of the lunatic, &c. to bring him forth to be examined, and to notify his guardians, trustees of his estate, &c. to appear if they please in his defence; or an order may on motion be granted by the chancellor, that the lunatic, &c. be produced at the time and place of executing the writ. The commissioners may issue summons for attendance of witnesses which are served, and the attendance of witnesses compelled in the manner before directed. [ch. 3. § 12] As before remarked, the solicitor attends to these duties when employed, and the commissioners are merely notified of the time and place of executing the writ.

§ 11. Inquisition.

At the time and place the commissioners, sheriff and jury assemble; counsel in behalf of the commission and of the lunatic may also be present. The acting commissioners and the jury may have a view, and question the

(9) Blake 436. form of precipe.
(10) ib. 437. instructions.
(11) ib. 439. return to precipe and warrant to bring up the lunatic, &c. ib. 440. summons to witnesses.
(12) ib. 440.

lunatic, and the person who has the custody may be compelled to produce him. If a previous order has not been obtained, and if on the warrant before directed being given, the lunatic if able to be removed, (if not, the jury or some of them may visit the lunatic and report to the rest) is not produced the commissioners may adjourn, make no return, or return the fact, but the most advisable course seems to be to obtain an order on petition upon the contemptuous parties to produce the lunatic, which would be made of course, accompanied by a censure of their conduct, and their payment of costs, if not commitment for the contempt.(1) The alleged lunatic may be present if he pleases. It is his privilege.(2) An exact statement of the property of the lunatic should be obtained, and the inquisition prepared. The oath(3) to the jurors and witnesses is administered by the commissioners. One of the commissioners, the first named acting commissioner,(4) reads to the jury the commission, and explains the object of their meeting and their duties. The witnesses are then examined. The evidence is first, as to the lunacy: secondly, as to his property, &c. The senior commissioner may then sum up and recapitulate the evidence by way of charge. The jury having deliberated upon the matter of enquiry, the inquisition which has been previously prepared with blanks is read to them, and they direct in what way the blanks are to be filled up. The commissioners and jury then sign and seal the inquisition,(5) which is a response to the commission, in relation to the fact of lunacy, to the property, heirs, &c. The inquisition is annexed to the commission which has a return by the commissioners to this effect, viz: "The execution of this commission appears in the schedule hereunto annexed."(6) The return to the commission (that is the finding of the inquisition,) must be clear and unequivocal, and expressly state whether the party was, or not, a lunatic,(7) or language equivalent thereto. On

§ 12. Return of commission and inquisition.

(1) 1 Grant 204. c. 2 Ves. 405. Ambl. 111. 1 P. Wms. 701.—1 Swans 6.
(2) 12 Ves. 455.
(3) Bla. 437-8.
(4) 1 Grant 296.
(5) Bla. 437-8. Grant 295.
(6) Grant 296. Coll. 110. Highmore 242.
(7) 19 Ves. 235. Return to a commission of lunacy that the party is a lunatic enjoying lucid intervals, and that during such intervals he is competent to the government of himself and his affairs, quashed, and a new commission issued. There was no instance of a melius inquirendum in such a case. 1 Jacob 333.

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§ 13. Confirmation, petition for committee, or traverse and proceedings.

the next regular motion day the inquisition, commission and return, are read in court, and on motion may by order be confirmed. But the commission may be quashed, and a new one directed in case of misconduct, or apparent insufficiency of the return,(8) or the finding may be traversed by any person aggrieved, or the commission superseded afterwards on application of the lunatic, &c. on the recovery of a sound mind, or any person aggrieved on showing sufficient cause. It is said the traverse of the inquisition is the right of a party, and cannot be refused.(9) And if interposed, the court will direct the course on the traverse in a manner best calculated to inform its conscience.(10) The first order therefore, may be that the lunatic be brought into court for inspection, and if the court be not satisfied, the next order may award an issue at law to be made up under the direction of the court and conducted as directed, [ch. 2. § 54.] and a provisional order may also be made for the care of the estate, until the fact of the lunacy be ascertained by a verdict.(11) The proceedings on the feigned issue and on return of verdict being as directed, [ib. § 55.] and if no new trial [ib.] or appeal [ib. § 62.] interpose further obstacles, the petition which had been prepared and presented on the return of the commission and inquisition, may be now acted upon.

PETITION FOR COMMITTEE.

§ 14. Petition for appointment of committee and proceedings thereon; reference, &c.

A petition(1) usually signed by some relation or friend of the lunatic, reciting the inquisition praying for the custody of the person and the management of the estate of the lunatic, &c. and that it be referred to a master to inquire into and report upon the propriety, fitness, and ability of the proposed committee, and of the sureties which he or they may offer for the fidelity of the trust, is presented on a motion day. An order if granted on the motion thereupon made, is in accordance with the prayer of the petition, and being entered and a certified copy served on the master, he will proceed accordingly. A state of facts and proposal of committee and sureties being delivered to the master, with an affidavit of its truth, and an affidavit of

(8) 3 Atk. 6. 1 Jacob 333.
(9) 19 Ves. 280. vid. 6 J. Ch. 440. 4 J. Ch. 169. 441. 3 J. Ch. 567.
(10) 1 J. Ch. 600.
(11) 1 J. Ch. 600.
(1) Bla. 446. 1 J. Ch. 436. ante Ch. 2 § 5 &c.

§ 16 Reports. confirmity and appointment on bond being given and approved; costs &c.

the sureties, the master on approval of the committee and sureties will report accordingly.(7) On presenting the report, an order is entered for confirming the same and for the appointment of committee on condition of their executing a bond in the amount and with the sureties reported, the form and execution of which is to be approved of and the approval endorsed thereon by the master. The bond(8) being executed and a certificate of approval endorsed, is filed with the register, assistant register or clerk. The order for the appointment has in practice been usually considered a sufficient authority. But a commission(9) under the seal of the court may be taken out on filing the bond as directed. The register &c. at the same time is bound to deliver to the committee copies of certain rules of court directing them in portions of their duty and which will be presently given. With respect to costs [See ch. 2. § 80-3] the petitioner is not liable on failure, if acting in good faith(11) but the unsuccessful traverser may be.(12) The nearest relations of a supposed lunatic were ordered to pay the costs occasioned by their opposition to a petition for a commission of lunacy presented by stangers to the family.(13)

§ 17. Duties and powers of the committee.

The commission continues till suspended, superseded, or revoked by the death of the lunatic. When the lunatic &c. is restored to his right mind, his estate may be restored,(1) and the commission superseded. If he die, the trust ceases, the real descends and the personal is destributed, as in ordinary cases.(2) The committee on the passing of his accounts on settlement of the estate may be allowed his commission and costs and charges attendant upon the trust.(3) On the execution of a commission of lunacy, &c. the commissioners for every day they are necessarily employed in hearing the testimony and taking the inquisition, are entitled to the allowance made by law to commissioners to make partition or admeasure dower; and for drawing the inquisition and process, and serving notices, when no solicitor is employed, the

Fees on execution of commission of lunacy.

(7) See Hoff. Mr. 147 154. vid Bla 484-450. See forms. Hoff.Mr.372 373.
(8) Hoff. Mr. 374. No. 46. Bla 449. and certificate of approval ib.
(9) See commission to commit person and estate of habitual drunkard, rules appendix No. 12.
(11) 4 J. Ch. 441.
(12) 4 J. Ch. 169. See 6 J. Ch. 440
(13) In re Smith. 1 Russel 348.
(1) 2 R. S. 55. § 24.
(2) ib. § 25.
(3) As to commissions and allowance; see 3 J. Ch. 43, and as to costs of the inquisition, commis-

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fees to which a solicitor would be entitled for the same services.(3) The duty of the committee to file an inventory &c. is the same as that of a guardian or receiver, and the superintending vigilance of the officers of the court designated by its rules, is to be directed to guard the interests of this trust as well as of the others.(4) Every guardian, receiver, or committee, appointed by this court shall, within six months after his appointment, file in the office where the appointment is entered, a just and true inventory, under oath, of the whole real and personal estate committed to his care or guardianship; stating the income and profits thereof, and the debts, credits and effects, so far as the same have come to his knowledge. And he shall annually thereafter, if the yearly value or income of the estate exceed five hundred dollars, or once in every two years, or annually, at his election, if it is of a less value, file in the same office an account under oath of his guardianship or trust, and of any other property or effects belonging to the estate which he has since discovered, and of the amount remaining in his hands or invested by him, and of the manner in which the same is secured or invested; stating his receipts and expenditures from the time of rendering his last account, in the form of debtor and creditor.(5) The register, assistant register, or clerk, at the times of the appointment of any guardian, receiver, or committee, shall deliver to him a copy of this and the next preceding rule; and shall also, at every stated term of the court, at the place where such appointment is entered, present to the chancellor or vice chancellor, on the first day of the term, a list of all guardians, receivers and committees, who have neglected to file their inventories or accounts for more than three months after the time limited for that purpose, to the end that such order may be made for the removal or prosecution of the delinquents as may be just; and which list shall be publicly read in open court, for the information of all concerned.(6) It shall be the duty of the injunction master in each circuit, in the month of January, in every year, to examine the inventories and accounts of guardians, receivers, and committees which have been filed with the register, assistant register, or clerk, in his cir-

Committees, Guardians & receivers to make reports.

Register &c. to furnish copy of these rules and report those who neglect to render accounts.

The injunction masters to examine & report on accounts of guardians, committees &c.

sion, &c. see 4 J. Ch. 441. 169. 6 J. Ch. 440.
(3) R. 162.
(4) See 2 J. Ch. 242. 401.
(5) R. 154. 2 R. S. 55. § 8–10.
(6) R. 155. 154.

cuit, for the preceding year, and report to the court at the next term in that circuit, whether such accounts appear to have been correctly kept; whether there has been any waste or misapplication of the funds, and whether the same are properly and safely invested or secured, so far as he can ascertain the same from the examination of such accounts and inventories on file.(7) The petitions which may grow out of the preceding appointment are: 1. Those in behalf of the committee; 2. creditors and others including the lunatics.

PETITIONS INCIDENTAL.

1. *In behalf of the committee.* 2. *Of creditors and others.*

§ 18. Petitions after appointment of a committee. first, on behalf of the committee.

Petitions may be presented by the committee: 1st; Where the personal property of the idiot, lunatic, non compos or drunkard, will not pay his debts, the committee may petition for an order to lease mortgage or sell so much of the real as will satisfy the demands;(1) 2. petition may be made to lease, mortgage or sell, where the personal and the rents and profits of the real are insufficient to maintain the idiot, &c. or his family, or to educate his children;(2) 3. for an authority to convey or assure where the idiot, &c. possesses real, by way of mortgage or as trustee for others;(3) 4. for an order to restrain waste(4) on the real estate of the lunatic, &c. 5. for authority and direction in the management of the estate, as to sell timber or convert the real into personal, when for the benefit of the lunatic,(5) &c. 6. to pass accounts, settle accounts with lunatic restored to reason, or to pass accounts, accept resignation and appoint a new committee; 7. for an order that the lunatic, &c. be committed to the care of the overseers of the poor, the estate being exhausted in his maintenance.(6) 8. For partition, &c.

§ 19. Petitions thereon in all the cases.

The petition, beside the general requisites [ch. 2. § 5, 6.] must in the first case, set forth the particulars and amount of the real and personal, the application or partial payments made, and an account of the debts and demands

(7) R. 156. see 2 J. Ch. 242. 401.
(1) 2 R. S. 53. § 11. vid. 2 J. Ch. 400.
(2) 2 R. S. 54. § 16.
(3) 2 R. S. 55. § 19.
(4) 7 J. Ch. 24.
(5) 3 J. Ch. 347.
(6) 2 J. Ch. 400. case of M'Farlan.

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existing;(7) in the second case a similar statement varied or added to, to meet the object of the petition, and in all the other cases, the grounds of the application, verified in the usual manner [ch. 2. § 7.] or supported by extraneous affidavits or official certificates.

§ 20. Proceedings in these cases, references, &c

The proceedings until the petitions are presented, and the first orders made, are similar to those in other petition causes, [ch. 2. § 5, &c.] and the first order in all the cases excepting perhaps the 4th, may be for a reference to a master; in the 1st, 2d, and 3d cases—to enquire into the truth, to hear all parties interested in the real, and report with all convenient speed, varying each order to meet the object of the particular application; in the 5th, to enquire into the truth, to hear all parties interested in the inheritance, or who may be entitled to the succession, and ascertain if the sale of the timber, or the conversion of the real into personal would be for the benefit of the lunatic, &c.; in the 6th and 7th, to enquire into the truth or examine into, pass upon, or settle the accounts and report thereon. The 4th case may require immediate and summary relief, and an order may be instantly granted to restrain waste, and upon the violation thereof, an attachment on motion issue, or the proceedings may be as in the similar case of petitions to stay waste on premises purchased under execution and subject to redemption. [post ch. 5.] The injunction may issue, but on the condition required where temporary relief is sought, as directed. [ch. 2. § 11, 12.] If on the day appointed in such case cause be shown against the application, the order may be discharged or a reference directed to enquire and hear all parties. The references to the master are conducted in the ordinary manner. [ch. 2. § 36, &c.] On the coming in of the report—if it appear in the *first case* that the personal has been exhausted, or in the *second case* that the personal, and the rents and profits of the real are insufficient to maintain, educate, &c. an order may be made for the mortgage, lease or sale of so much of the real as will pay the debts or maintain, educate, &c. But court in the first case may require of the committee additional security for the application of moneys so to be raised from the real, and will direct in the second case how the proceeds shall be secured and appropriated. The court will further give such orders respecting the time and manner of any sale so authorised that no conveyance

(7) See 2 R. S. 51-5.

pursuant to sale be executed until the sale is reported on oath of the committee and confirmed by the court.(12) In the third case (where property is held in trust or mortgage,) the court will by order direct how the conveyance or assurances shall be made, and for a reference and like proceedings. In the 4th case on coming in of the report, the order to stay waste may be continued or made perpetual. In the 5th case, if the report be in favor of the sale of the real, or the conversion of the personal into real, the proceedings may be similar to those in the first and second cases; additional security be required and no deed be executed till report of the committee and confirmation thereof. In the 6th case, on report, the same may be confirmed, and the accounts thus adjusted, carried to the credit of the committee; on finally passing and settling his accounts, his resignation may be accepted, and his bond ordered to be cancelled. So in the 7th case, if the report be that the accounts being taken it appears that the estate is exhausted, the court may relieve the committee of the trust and direct the future custody of the lunatic, &c. pursuant to the provisions of the law.

§ 21. Sale, &c. report of committee; enrolment of decree, &c.

Wherever the committee is ordered to sell, he will be governed by the special directions in the order of sale, and if the lands are in the city of New-York, also by the standing rule of the court in relation to such sales by any committee, guardian or master.

Where lands in the city of New-York are sold by a master, guardian, or committee, they shall be sold at public vendue, at the Merchants' Exchange, between twelve o'clock at noon and three in the afternoon, unless otherwise specially directed in the decree or order of sale. The notice of such sale, except where a different notice is required by law, or by the order of the court, shall be published in one or more of the daily papers of that city for three weeks immediately previous to the time of sale, at least twice in each week. When lands in any other part of the state are directed to be sold at auction, notice of the sale shall be given for the same time, and in the same manner as is required by law on sales of real estate by sheriffs on execution, and by masters and commissioners in partition.(13) The sale being made, the case is noti-

(12) 2 R. S. 51-5. (13) R. 139.

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ced for a regular motion day upon the report of the committee, and thereupon the same may be confirmed and a deed directed, or further order taken as the court deem expedient. To secure and perpetuate the title of the purchaser, the proceedings may be enrolled as directed, [ch. 2. § 83.] and the deed when executed and duly acknowledged or proved, may be recorded. Every conveyance, mortgage, lease and assurance made under the order of the court pursuant to the provisions of the statute,(3) will be valid as if made by the idiot, lunatic, &c. when of sound mind.(4) But the real cannot be leased for more than five years or mortgaged or aliened or disposed of otherwise than as directed by the statute.(5)

§ 22. Proceeds.

The committee in making the application of the proceeds in the first case must pay all debts in equal proportions without preference of sealed instruments.(6) In the second case the court directs how the proceeds are to be secured and applied.(7)

§ 23. 8. By committee for leave to agree to a partition.

8. Another application by the committee may be made for an order authorising such committee to agree to a partition of real estate, which by any idiot, lunatic, or person mentally incapable of managing his affairs, is held in joint tenancy, or in common, or in any other manner to authorise his being made a party in a suit in partition. Whenever it appears to the court on such application, that the interest of the idiot, lunatic or other person, or of any of the parties interested in the estate, requires a partition it will be referred to a master, to enquire into and report upon the circumstances. Upon the coming in of the report and a hearing and examination of the matter, the court may authorise the committee to agree to a partition of such estate and to execute releases of the right of the lunatic, &c. in and to the share of the estate falling to the other joint tenants or tenants in common. Such releases will be as valid and effectual to convey the share of the lunatic, &c. as if the same had been executed by him when of sound mind and understanding and for a valuable consideration.(8)

(3) 2 R. S. 51. tit. 2.
(4) ib. 55. § 21.
(5) ib. § 23.
(6) ib. 54. § 15.
(7) ib. § 17.
(8) 2 R. S. 331. § 89-91.

2 BY CREDITORS AND OTHERS INTERESTED.

§ 24. Petitions by creditors and others.

1. Creditors and others interested may apply by petition to compel committee to file an inventory of the estate ;(1) or, 2. After inventory filed, creditors may petition for payment of debts out of the estate,(2) and if necessary for that purpose that the real estate be sold,(3) or rather that the committee be ordered to mortgage, sell or lease the estate pro tanto, for the purpose of paying debts pursuant to the statute.(4) 3. Any person entitled to a conveyance or assurance may, by petition or bill, apply to compel committee of any real estate held by the lunatic, &c. by way of mortgage or as trustee for others, to execute the conveyance or assurance.(5) 4. The court may also compel a specific performance by committee of any bargain, contract or agreement made by the lunatic, &c. when of sane mind.(6) 5. Application may also be made for the suspension of the powers of committee, or for his removal and appointment of a new committee, on the ground of mismanagement or hazard of the fund, &c. 6. The lunatic, &c. may apply for a supersedeas to the commission and a restoration of his estate, on the ground of restored sanity,(7) and for a settlement of accounts.

§ 25. Petitions and proceedings.

The proceedings in the petitions by creditors and others bear so close an analogy to those last considered that this branch of the subject may be disposed of by a few observations. In the first case the filing of the inventory after expiration of six months from the appointment of the committee, may be compelled by process or order of court, usual in such cases. If after service of the order the committee neglect to file the inventory under oath as prescribed,(8) [ante § 17.] an order either absolute or nisi, may be granted for an attachment. [See ch. 2. § 30. 84.] In the *second case*, as the statute(9) now directs that the real estate of the idiot, lunatic, &c, shall not be aliened or disposed of otherwise than therein di-

(1) See 2 R. S. 53. § 8, 9, 10. 2 J. Ch. 242.
(2) 2 J. Ch. 242.
(3) 2 J. Ch. 400. 242.
(4) 2 R. S. 53. § 11. See 2 J. Ch. 400. 242. where on bill filed by creditor, the real was ordered to be sold, without any previous petition of the committee.
(5) 2 R. S. 55. § 20. 19.
(6) R. S. ib. § 22.
(7) 3 J. Ch. 567. 6 J. Ch. 440.
(8) R. S. ib. § 8, 9, 10.
(9) ib. § 23.

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rected, it might seem, that the creditor's only remedy after compelling the committee to file an inventory, would be to apply for a further order to compel the committee to sell, mortgage or lease for the payment of the debts set forth in the petition. In this case, the order on the committee might be enforced as is last directed, or the court might supersede the commission and direct a new committee, or take such other order as the necessity of the case might demand. Prior to the statute, where the real was ordered to be sold at the instance of a creditor, the sale was to be conducted under the directions of the court by a master, and the committee and the terms of sale, &c. reported to the court for its approbation, before conveyance executed.(10) In the third case the court will in like manner compel the committee on hearing of all parties interested, to execute such conveyance or assurance of the trust or mortgaged property held for others, and direct the mode and manner in which the same shall be made.(11)

In the fourth case the committee may in like manner be compelled to a specific performance of the bargain, contract or agreement, and under like special directions execute all necessary conveyances and acts for the purpose.(12) The fifth case may be by order to show cause, reference, hearing of all parties, and in the mean time the powers of the committee may by temporary order be suspended and the order if violated, be enforced by attachment. The powers of chancery in this case are incidental and necessary to its jurisdiction over the subject matter, and will be regulated to meet the exigency. In the 6th case, the lunatic, &c, if restored to his right mind would be entitled to his estate.(13) On petition by the lunatic, &c. to supersede the commission, or discharge the committee on the ground of restored sanity, the court will either order a reference to take proof as to the allegations, to examine the lunatic if the master think fit, and report the proof and his opinion; or direct the lunatic to attend in court to be examined by the chancellor. It is also in sound discretion to allow him to traverse the inquisition, or try the question on a feigned issue. And

§ 26. By lunatic, &c.

(10) 2 J. Ch 400. 242.
(11) See 2 R S. ib. § 19. 20.
(12) ib. § 22.
(13) 2 R. S. ib § 24.

where the lunacy was satisfactorily established in the first instance, and the opinion of the court remained, after repeated applications for a discharge of the committee, unchanged, trial of the question was directed to be at the expense of the lunatic or his friends, and not out of his estate, which consisted of personal, acquired by the industry of his wife, and barely sufficient to maintain her, her children and husband.(13)

3. GENERAL GUARDIAN.

§ 27. Petitions for appointment of general guardians for the custody of the persons and estates of infants.

Though surrogates had concurrent power with this court in the appointment of general guardians, they had none over them as trustees.(1) Now surrogates may appoint, remove, appoint anew, and call them to account, subject to the appellate jurisdiction of chancery.(2) [see ch. 2. § 64.] For the purpose of having a general guardian appointed in this court, the infant if of the age of fourteen years or upwards, or some relative or friend if the infant is under fourteen, may present a petition to the court, stating the age and residence of the infant, the name and residence of the person proposed or nominated as guardian, the relationship, if any, which such person bears to the infant, and the nature, situation and value of the infant's estate.(3) The petition(4) in other respects is governed by the rules laid down under the head of petition, in general. [ch. 2. § 5, &c.] Where the amount of property is excessively small, the court may make an order for appointment without reference. Thus in England, where two infant orphans had but £15 income, on presenting petition and on motion, a guardian was ordered, without reference, to save expense.(5)

§ 28. Petition, by whom, and what it contains.

§ 29. Proceedings prior to the presenting of the petition; preferred to a master; what inquiries he makes; his report annexed to petition.

Previous to presenting the petition to the court, if the infant reside in the city of New-York, the petitioner must apply to the taxing or injunction master in that city; if in any other county in the state, to the master nearest to

(13) 3 J. Ch. 567. 6 J. Ch. 440.
(1) 1 J. Ch. 99.
(2) 2 R. S. 150-153. As to guardianship see ib. and 1 R. S. 728.
(3) R. 150.
(4) See Hoff. Mr. 369. form No. 40. Bla. 328-332. Persons residing out of the jurisdiction not to be appointed guardian for an infant. There must be some one answerable to the court.—1 Jacob's Rep. 193.
(5) 1 Russ. 478. vid. 1 Jac. and Walk. 395.

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the residence of the infant; or if the infant reside out of the state, to any taxing or injunction master, who must by inspection or otherwise ascertain the age of the infant, and if of the age of fourteen years or upwards the master must examine him as to his voluntary nomination of a suitable and proper person as guardian; if under fourteen, the master must ascertain who is entitled to the guardianship, and must name a competent and proper person as guardian. The master must also ascertain the amount of the personal property and the gross amount or value of the rents and profits of the real estate of the infant, during his minority, and also ascertain the sufficiency of the security offered by the guardian.(6) In making such inquiries, the master, in his discretion, may direct notice to be given to such of the relatives of the infant as he may think proper, to appear before him and be heard in relation to the application; it shall be the duty of the master in all cases to see that the rights of the infant are properly guarded and protected, and he may require the attendance of such witnesses before him to give testimony on the subject of the application as he may think necessary or proper. The master must annex to the petition a report containing the particulars mentioned in the preceding rule, specifying what relatives or friends of the infant have been notified to appear before him, if any, and if none have been notified, stating the cause thereof. The report must also state that each of the persons proposed is worth the requisite amount, over and above all his debts, or that the real estate proposed to be given as security, is of the value required by the rules of the court.(7)

§ 30. Presenting the petition, & order thereon; order to appoint guardian.

On presenting to the court the petition with the master's report annexed, an order may be obtained for the appointment of the guardian; or the court, in its discretion, may direct a further reference, and direct what relatives or friends of the infant shall have notice to attend on the same. The appointment shall not be valid until the requisite security is given and filed in the proper office, with the certificate of the master endorsed thereon,

(6) R. 151. See ante ch. 2 § 36-7.

(7) 152. See Hoff. Mr. 331-5. 367-8. forms; state of facts and proposal for appointment. No. 37. affidavit of truth. ib. affidavit of sureties and report of master.

approving of the form and manner of the execution thereof.(8) If the sureties as reported be approved, and no further reference ordered, the report of the master will on motion be confirmed, and an order entered [ch. 2 § 33.] for the appointment of the guardian, upon his executing the requisite security before a master. A copy of the order is then obtained and served [ch. 2, § 35-6.] on the master, who proceeds to take and approve the bond.

§31. Bond, or security to be given by general guardians.

The security to be given by the general guardian of an infant, must be a bond in a penalty of double the amount of the personal estate of his ward and of the gross amount or value of the rents and profits of the real estate during his minority, together with at least two sufficient sureties, each of whom must be worth the amount specified in the penalty of the bond over and above all debts; or instead of personal security the guardian may give security by way of mortgage on unincumbered real property, of the value of the penalty of his own bond only. But the court, in its discretion, may vary the security where, from special circumstances, it may be found for the interest of the infant, and may direct the principal of the estate, or any part thereof, to be invested in public stocks, or on bond and mortgage in the name of the register, assistant register or clerk, for the benefit of the infant, and that the interest or income thereof only be received by the guardian.(9) The bond with the certificate of approval endorsed is then filed in the office of the register, assistant register or clerk, [ch. 2. § 33-4.] whose duty it is at the time of the appointment to deliver to the guardian a certified copy of certain rules, regulating the guardian's duty, as to filing an inventory and reporting,(10) and the duty of the register, &c. upon neglect of the guardian,(11) being the same rules, required to be delivered to committees and receivers. [ante § 17.]

§ 32. Duties of all general guardians and liability in trebledamages & waste.

Every guardian in soccage, and every general guardian, whether testamentary or appointed, shall safely keep the things that he may have in his custody belonging to his ward, and the inheritance of his ward, not make or suffer any waste, sale or destruction of such

(8) R. 153.
(9) R. 148. See Hoff. Mr. 370. No. 41.
(10) R. 154.
(11) R. 155, 156.

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things or of such inheritance, but keep up and sustain the houses, gardens and other appurtenances to the lands of his ward, by and with the issues and profits thereof, or with such other monies belonging to his ward, as shall be in his hands; and deliver the same to his ward when he comes to his full age, in as good order and condition, at least, as such guardian received the same, inevitable decay and injury only excepted; and shall answer to his ward for the issues and profits of real estate, received by him, by a lawful account.(1) If any guardian shall make or suffer any waste, sale or destruction of the inheritance of his ward, he shall lose the custody of the same, and of such ward, and shall forfeit to the ward thrice the sum at which the damages shall be taxed by the jury.(3) The ordinary bond of a general guardian does not embrace the receipt and disposition of money from sale of land, as where partition and sale had been made.(4) But now the general guardian cannot receive any part of the proceeds of a sale of real property belonging to such infant sold under a decree or order of the court, until the guardian has given such further security for the faithful discharge of his trust as the court may direct.(5)

Powers & restrictions thereon: as to proceeds of sale by decree.

Do. of sale on a mortgage or partition.

No monies arising from the sale of the real estate of an infant on a mortgage or partition sale, or under any decree or order of the court can be paid over to such general guardian, excepting so much thereof, or the interest or income from time to time, as may be necessary for his support or maintenance, unless such guardian has previously given sufficient security on unincumbered real estate to account to the infant for the same in the usual form.(6) It had been previously decided that where one of the sureties becomes insolvent, the court would refuse to order money which had been paid into court to be paid over to the guardian, until further security.(7) But the proceeds of property not thus placed under the control of the court, might have been paid over to the general guardian where his security was very inadequate. These restrictions therefore on their powers and the precautions adopted to scrutinize and supervise their trust, are wise

(1) 2 R. S. 153. § 20. & ib. 333-4.
(3) ib. § 21.
(4) 1 Hopk. 512.
(5) R. 147. see 1 Hopk. 48.
(6) R. 149.
(7) 1 J. Ch. 561.

and necessary. A guardian continues until the infant arrives at age, unless changed by order on good cause shown ;(8) and his opportunities for mis-application of the funds are still many, and require all the precautions taken. He is responsible to the court for his conduct, and removable for misbehaviour.(9) He has no power over the real estate of his ward, except perhaps to lease it,(10) and to receive the rents and profits.(11) But he may sell the personal for the avowed purpose of his trust without any previous order of the court,(12) and might, therefore, if his acts and the condition of his security were not vigilantly examined, and the execution of the trust controlled by the officers of the court, greatly impair, if not ruin, the resources of an infant for his maintenance and education.

PETITIONS INCIDENTAL.

§ 33. Collateral petitions : to compel infant trustee, or mortgagee to convey.

The petitions growing out of this appointment may be: 1. To compel infant trustee or mortgagee to convey. Any infant seised or possessed of lands, tenements or hereditaments, by way of mortgage, or in trust only, for others, on petition of the guardian, or of any person in any way interested, may be compelled to convey and assure such lands, &c. to any other person, in such manner as the court direct. Every conveyance or assurance, pursuant to such order, will be as effectual as if made by infant when of age.(1) 2. The court have also the power to decree and compel a specific performance, by any infant heir or other person, of any bargain, contract or agreement, made by any party who may die before the performance thereof, on petition of the executors or administrators of the estate of the deceased, or of any person or persons interested in such bargain, &c. on hearing all parties concerned, and being satisfied that the specific performance ought to be decreed or compelled.(2) 3. Whenever it shall appear satisfactorily, by due proof, or on the report of a master, that any infant holds real estate in joint tenancy or in common, or in any other manner authoris-

§ 34. Specific performance.

§ 35. Partition by guardian.

(8) 1 J. Ch. 25.
(9) 1 J. Ch. 99.
(10) 7 J. Ch. 150.
(11) 1 J. Ch. 561.
(12) 7 J. Ch. 150.
(1) 2 R. S. 194. § 167-8. see 3 J. Ch. 408.—A resulting trust was held within the former act, 2 J. Ch. 537. see similar proceedings in case of committee [ante § 18.] & proceedings before master on reference. Hoff. Mr. 141-7. 19. 370. No. 42.
(2) 2 R. S. 194. § 169. 2 J. Ch. 540.

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ing his being made a party to a suit in partition, and that the interest of such infant, or of any other person concerned therein, requires partition of such estate, the court may direct and authorise the general guardian to agree to a division, or to such a part of the estate, as in the opinion of the court is incapable of partition, or is most for the interest of the infant to be sold.(3) Such guardian must report to the court, on oath, the partition or sale so made by him, and if the same be approved and confirmed, an order will be entered authorising the guardian to execute conveyances of the right of the infant to such part as is sold to the purchaser thereof, or to execute releases of the right of such infant to such part as in the division falls to the shares of the other joint tenants, or tenants in common.(4) Such deeds will be as valid and effectual to convey the share and part of such infant, as if executed by the infant after full age. And in case of a sale of any part the infant will be deemed a ward of the court, and such order taken as the court direct, for securing, investing and applying the proceeds of the sale and requiring security from the guardian for that purpose.(5)

§ 36. Petition for maintenance.

4. On petition by guardian or next friend for maintenance: If the capital of an infant's estate, devised and in the hands of executors be small, that will be applied, otherwise the interest.(6) Where a minor for whose benefit a valid accumulation of the interest or income of personal, or rents and profits of real, has been directed, is destitute of other sufficient means of support or education, the chancellor upon application of such minor or his guardian may cause a suitable sum to be taken from the moneys accumulated or direct to be accumulated, and to be applied to the support or education of such minor.(7)

§ 37. Infant partner

5. For an order for the appointment of a suitable person to carry on trade for an infant partner.(8)

§ 38. Petition and proceedings for the custody of infants.

6. For the custody of an infant improperly restrained. On petition verified, or upon affidavit of facts, a motion may be made for a habeas corpus to bring up and dis-

(3) 2 R. S. 330. § 86.
(4) ib. § 87.
(5) ib. § 88.
(6) 4 J. Ch. 100. see ib. 378-9. 1 Hopk. 122. see course of proceedings for maintenance before master, Hoff. Mr. 135-141.
(7) 1 R. S. 774 § 5. 736.
(8) 4 J. Ch. 619.

charge an infant improperly restrained: but the court will not in this way settle the rights of guardianship, or deliver over the infant to another.(9) The infant may be relieved from illegal restraint, and may make his own election if competent; if not, the court will exercise its judgment.(10) The power is concurrent with that of the supreme court,(11) but the welfare of the child, which is the leading object of the exercise of such power, may be better guarded by chancery under its peculiar jurisdiction.(12) On application by a husband or wife, the applicant representing the other as having joined the shakers, who detain a child of the marriage, the chancellor (justice of supreme court or circuit judge,) may on inquiry and satisfactory proof, allow a habeas corpus, and if returned non est may, on proof of concealment, issue a search warrant for such child, and if brought up, award its custody to the parent who has not joined the shakers, the order being subject to be annulled.(13) 7. For the sale, lease or mortgage of an infant's estate and appointment of a special guardian for that purpose. This will be considered in the next chapter.

§ 39. Children secreted by shakers.

(9) 4 J. Ch. 82. see 1 Jacob, 251. n. (c) 254. n. (b). An action for the wrongful taking or detention of a minor may be brought by a testamentary guardian by 2 R. S. 150.

(10) 4 J. Ch. 82.

(11) 13 J. 418.

(12) ib. 5 Binney 520. 10 Ves. jr. 59. 3 Burr. 1436. c. See 1 Jacob 245. 264. 266. as to the principle on which chancery exercises the jurisdiction.

(13) 2 R. S. 149. §5-7.

CHAPTER V.

ORIGINAL PETITIONS.

§ 1. Original petitions.

THE petitions in the preceding chapter for committee and general guardian as well as those considered incidental, though strictly original, were placed under the head of preliminary proceedings for the reasons before assigned. [see ch. 2. § 3. ch. 4. § 1.] But the applications: 1. for the sale, lease or mortgage of an infant's real estate and appointment of a special guardian for that purpose; 2. for an order in nature of injunction to stay waste upon property sold under execution, but subject to redemption; 3. for injunction, receiver, and proceedings against certain incorporated bodies; 4. for partition or sale of real estate; 5. for appointment, resignation, or removal of trustees; 6. for surplus of intestate's estate paid into the treasury by a public administrator; 7. for the discovery of the death of persons, on whose lives any particular estate depends; 8. for the writ ad quod damnum, &c. are original proceedings, and will be considered, in the present chapter in the above order.

1. SPECIAL GUARDIAN, FOR SALE, &c.

§ 2. Petition for sale, lease &c. of infants real and for guardian pro hac vice; who may apply, and what the petition must contain.

Any infant seized of real estate or entitled to any term for years in lands may apply for the sale or disposition of his property in the manner hereafter directed.(3) His general guardian if he has any, and if none, the infant himself if of the age of fourteen, or some relative or friend if under that age, may present a petition to the chancellor, stating the age and residence of the infant, situation and value of his real and personal estate, situation, value and annual income of the real estate proposed to be sold,

(3) 2 R. S. 194. § 170. vide. 1 Hopk. 122. 341. 512. 4 J. Ch. 378-9.

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and the particular reasons which render a sale of the premises necessary or proper; and praying that a guardian may be appointed to sell the same. The petition must also state the name and residence of the person proposed as such guardian, the relationship, if any, which he bears to the infant, and the security proposed to be given,(4) and must contain the usual requisites as to form, substance and verification.[ch 2. § 5-7.] In stating the situation of the real estate, if subject to dower, this fact may be mentioned, and also an offer to join in the sale if any made by the widow, by way of consent in writing to accept a gross sum or equivalent investment, in lieu of dower, and to release, as directed by statute.(5) The reasons offered for the sale must be substantial. For infants' estates are not generally to be sold. It is said that the *expectation* of an increased income is not a sufficient motive. There must be some special reason for the measure,(6) and it must clearly appear to be for the infant's benefit. If the infant is absolutely in need of more than the income, this may be urged. If part of the property be improved and part unproductive, or exposed to waste, the improved may be reserved, and the rest sold.(7) But whenever it shall appear satisfactorily that a disposition of any part of the real estate of the infant, or of his interest in any term for years is necessary and proper, either for his support and maintenance, or for his education; or that his interest requires, or will be substantially promoted by such disposition, on account of any part of his said property being exposed to waste and dilapidation, or on account of its being wholly unproductive, or for any other peculiar reasons or circumstances, the court may order the letting for a term of years, the sale, or other disposition of such real estate or interest, to be made by such guardian or guardians so appointed, in such manner, and with such restrictions, as shall be deemed expedient.(8)

Sale. &c. of lands, when authorised.

§ 3.

Petition preferred to a master before presenting it to the court.

Report of master thereon.

Previously to presenting the petition to the court it must be presented to the master nearest to the residence of the infant, or if the infant is a non-resident, to any injunction or taxing master, who must certify thereon that

(4) R. 158.
(5) See 2 R. S. 195. § 181-2. post, § 10. R. 160. See Bla. 338.
(6) See 1 Hopk. 122. 341. 512.
(7) 1 Hopk 122.
(8) 2 R S. 195. § 175.

the person proposed as guardian is a suitable and proper person for that purpose, and that the persons proposed as his sureties are each worth the requisite sum hereafter mentioned over and above all debts, or that the land proposed to be mortgaged by way of security is unincumbered and of the required value. And if the master is not satisfied with the person nominated as guardian, or with the security proposed, he may name a suitable person as guardian, and state what further or other security should be given.(9) The proceedings may be similar to those on appointment of a general guardian, [ante ch. 4. § 29, &c.] preparatory to the presentment on a regular motion day [ch. 2. § 15.] of the petition and master's report or certificate indorsed.

§ 4 Presenting petition, provisional order for appointment conditionally, of guardians, for sale, and reference.

On presenting the petition to the court, if it satisfactorily appear that there is reasonable ground for the application, an order will be entered, appointing a guardian for the purposes of the application, on his executing and filing with the register, assistant register or clerk, the requisite security, approved of, as to its form and manner of execution by the master, signified by his approbation endorsed thereon; and referring it to any injunction or taxing master, or to a master specially designated in the order by name, to ascertain the truth of the facts stated in the petition, whether a sale of premises, or any and what part thereof, would be beneficial to the infant, and the particular reasons upon which his opinion is founded; to ascertain the value of the property proposed to be sold, and of each separate lot or parcel thereof, and the terms and conditions upon which it should be sold; whether the infant is in absolute need of any part of the proceeds of the sale for his support and maintenance, over and above the income thereof and his other property together with what he might earn by his own exertions. And if there is any person entitled to dower in the premises, who is willing to join in the sale, the master shall also ascertain the value of her life estate in the premises, on the principle of life annuities. But the master must not proceed on such reference until the guardian produces to him a certificate of the register, assistant register, or clerk, that the requisite security has been filed agreeably to the order of the court.(10)

(9) R. 159. see Bla. 338 9.
(10) R. 160. see Bla. 341. and Rules of former equity circuit courts, p. 51.

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§ 5. Security of Guardian for sale, &c. and filing same before proceedings on reference.

One or more suitable persons may be thus appointed.(11) But before any proceedings can be had upon such reference to inquire into the merits of the application,(12) the guardians must give bond to the infant to be filed with the register or assistant register, in such penalty, with such sureties, and in such form as the court shall direct, conditioned for the faithful performance of the trust reposed; for the paying over, investing and accounting for all monies that shall be received by such guardians, according to the order of any court having authority to give directions in the premises; and for the observance of the orders and directions of the court, in relation to the said trust.(13) The security required on a sale of the real estate of an infant must be a bond of the guardian, with two sufficient sureties, in a penalty of double the value of the premises, including the interest on such value during the minority of the infant, each of which sureties must be worth the penalty of the bond, over and above all debts; or a similar bond of the guardian only, secured by a mortgage on unencumbered real estate, of the value of the penalty of such bond.(14) The bond being taken, approved, filed, and a certificate of the filing produced to the master; or if the bond be secured by mortgage duly executed, acknowledged and recorded, and a certificate from the register of deeds, &c. in New-York, or from the recording officers of other counties, being produced, not only of the recording of the mortgage, but that the property in the interim has not been incumbered, the master, being satisfied also that no intermediate judgments or other incumbrances [see ch. 3. § 19.] have become a lien, will then, and not before, proceed upon the reference, [see ante ch. 2. § 36.] pursuant to, and in strict conformity(15) with the order, and make his report accordingly.

§ 6. Hearing on report; order thereon.

On producing the master's report, on a regular motion day, an order is moved for, agreeably to the report. But if it be against the propriety of a sale, lease, or other disposition of the estate, the petition may be dismissed,

(11) 2 R. S 194. § 171.
(12) ib. § 174.
(13) 2 R. S. 194. § 172. If forfeited the court will direct it to be prosecuted, ib. § 17.
(14) R. 157.
(15) See 1 Hopk. 341. Bla. 339.

and the provisional order for appointment discharged. If the report be in favour of the application, an order absolute may be granted, confirming the report, and the appointment, and ordering a sale, lease or other disposition, as the court, upon the facts reported, may deem most beneficial to the infant; [ante § 2.] but no real estate or term for years, can be sold, leased or disposed of in any manner against the provisions of any last will, or of any conveyance, by which such estate or term was devised or granted to such infant.(16) The order, if not previously prepared pursuant to the terms of the report, is drawn and settled under the special directions of the court, entered, and a certified copy [ch. 2. § 27. 32.] procured for the guardian or guardians appointed, as their authority to proceed in the sale, lease or other disposition of the premises. If a sale be ordered, it is conducted in strict conformity to the order, and the standing rule of court,(17) in relation to sales by committees, guardians and masters. [ante ch. 4. § 21.]

§ 7. Guardian's sale, lease, mortgage, &c.

§ 8. Guardian's report under oath.

The sale, leasing or other disposition of the property can only be conditional, for the court must be satisfied that it is in full compliance with the order. The agreement, therefore, for such sale, lease, &c. made in pursuance of such order must be reported to the court on the oath of the guardian making the same.(18)

§ 9. Order for confirmation of guardian's report, and for conveyance, investment, &c.

If on presenting the report on a regular motion day, it appear that the sale, leasing, &c. agreed upon, is in compliance with the order, the court may confirm(19) the agreement as reported, and give directions as to the conveyance to be executed when the proceeds of the sale shall have been deposited, the purchaser's mortgage, if one given, recorded, pursuant to the rule presently mentioned, or in what manner the proceeds, if less than $500, are to be invested or applied for the infant's benefit, after deduction of the stated costs of the proceedings. From the time of the application the infant will be considered a ward of the court, so far as relates to such property, its proceeds and income; the court must make order for the application and disposition of the proceeds of such property, and for the investment of the surplus

Application of proceeds of sales.

(16) 2 R. S. 195. § 176, 17) R. 139.

(18) 2 R. S. 195. § 177. Bla. 348.

(19) vid. ch. 2. § 32, &c. Bla. 345.

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belonging to the infant, so as to secure the same for his benefit, and direct a return of such investment and disposition on oath, as soon as may be, and require accounts to be rendered periodically by any guardian or other person who may be entrusted with the disposition of the income of such proceeds.(20)

Accounts of guardians.

§ 10 Proceeds of sale exceeding $500, to be brought into court & invested.

If the proceeds of the sale exceed five hundred dollars, and the guardian has not given security by mortgage upon real estate, he must bring the proceeds into court, that the same may be invested in stocks, or put out at interest by the register, assistant register or clerk, for the use of the infant; the guardian shall only be entitled to receive so much of the interest or income thereof from time to time as may be necessary for the support and maintenance of the infant. And if a mortgage is given by the purchaser for the purchase money, or any part thereof, it shall be taken in the name of the register, assistant register or clerk, with whom the order for a sale is entered, for the use of the infant. If the infant's interest in the property does not exceed one thousand dollars, the whole costs, including disbursements, shall not exceed twenty-five dollars.(21)

§ 11. Effect of sales and rights of infant in proceeds of sale.

All sales, leases, dispositions and conveyances, made in good faith by the guardian, in pursuance of such orders, when so confirmed, shall be valid and effectual as if made by such infant when of full age.(22) No sale thus made of the real estate of any infant, will give to such infant any other or greater interest or estate in the proceeds of such sale, than he had in the estate so sold; but the proceeds will be deemed real estate of the same nature as the property sold.(23)

§ 12. Claim of dower how satisfied, and released.

If the real estate or any part be subject to dower, and the person entitled thereto shall consent in writing to accept a gross sum in lieu of such dower, or the permanent investment of a reasonable sum, in such manner as that the interest thereof be made payable to the person entitled to the dower, during life, the court may direct the payment of such sum in gross, or the investment of such sum, as shall be deemed reasonable, and shall be acceptable to the person entitled to such dower, in manner aforesaid; which sums so paid or invested, shall be taken out of the proceeds of the sale of the real

(20) 2 R. S. 195. § 179.
(21) R. 161.
(22) 2 R. S. 195. § 178.
(23) ib. § 180.

Dower to be released.

estate of such infant. But before any such sum shall be paid, or such investment made, the court shall be satisfied that an effectual release of such right of dower has been executed.(24)

§ 13. Deed, lease, mortgage &c. of guardian; enrolment of proceedings; report of investment, and proceeds; passing accounts and cancelling guardian's security.

The guardian then executes a deed or conveyance pursuant to the directions of the court(25) to the purchaser, lessee, &c. or delivers the deed which may have been executed and left with the master as an escrow, the deed, mortgage if any, payment of consideration and deposit, being usually made simultaneously. The purchaser for the benefit of his title may then procure an enrolment of the proceedings as directed. [ante ch. 2. § 83.] The proceeds if over $500 being now invested by the court,(26) no report of such investment by guardian is ordered or made. But where the proceeds are less than $500 and received by the guardian, he must make and file a report(27) or return under oath [ante §8] of the investment and disposition of the proceeds, pursuant to the order of court, in fulfilment of the condition of his bond, and in obedience also to the spirit of the rule (a copy of which and of another rule must be furnished to him by the register, &c.) as directed [ante ch. 4. § 17.] requiring *every guardian* appointed by the court to file an inventory within six months, and render an annual or biennial account under oath, as directed in case of committees. [ib. § 17.] When it shall have appeared that the object of the sale or other disposition of the property has been accomplished, and the proceeds properly secured, applied or exhausted for the infant's sole benefit, the guardian may on passing his accounts, be allowed his commissions, &c.(28) and obtain an order to cancel his bond, or mortgage if he give one in lieu thereof. If however the bond be forfeited the court will direct it to be prosecuted for the benefit of the party injured.(29) But a release, bona fide, after the infant arrives at age would exonerate the sureties and be a bar to any subsequent bill brought by such infant against the guardian for account.(30) The proceed-

(24) ib. § 181, 182.
(25) 2 R. S. 195. § 177. Bla. 347.
(26) As to deposits and mode of investment, see 2 R. S. 171-2. R. 127. ante ch. 1. § 12.
(27) vide Bla. 352.
(28) As to commission, &c. The allowance is the same as to executors. 2 R. S. 153. § 22. See also, 1 Hopk. 28. 36-47. 3 J. Ch. 34.
(29) 2 R. S. 194. § 173.
(30) 6 J. Ch. 242.

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ings on a petition of the guardian to pass his accounts,(31) and cancel his security, may be like those of a committee. [ante ch. 4 § 18.]

2. INJUNCTION.

§ 14. Petition for order in the nature of an injunction to stay waste.

If any person against whose property an execution has issued, or any person in possession of premises sold under execution, shall, before the time expire which the law allows to redeem any premises so sold, do any act of waste, or threaten or prepare to commit waste, the purchaser or his agent may apply by petition to the chancellor (or circuit judge, supreme court commissioner, or first judge,) for an order restraining such wrong doer from the commission of any further waste upon the premises.(1)

§ 15. Petition and proceedings.

The petition is prepared [ch. 2. § 5-9.] and may be presented ex parte or on the usual service [ib. § 10, &c.] Upon application thus made, the chancellor, if satisfied by due proof that waste has been actually committed by the person against whom the application is made, or that the same has been threatened, or that preparations for committing it have been made by such person, will grant an order restraining such person from the commission of any waste on the premises so sold.(2) But as this may be one of those cases which from its urgency requires a dispensation of the usual requisites of application as to time, service and notice, [ch. 2. § 10-12.] the court may allow the application to be made instanter, and grant the temporary relief sought by an order to show cause, but to stay waste in the mean time; the petition and regular notice of motion thereon being served for the usual time, together with the order to restrain, &c. [ib. § 12.] This will enable the alleged aggressor to show cause why the order should be discharged and the petition dismissed, and in the mean time the order will operate as an absolute stay of waste. If on the day good cause be shown the order will be discharged with or without cost according to the justice of the case, [ib. § 21. 80.] but otherwise confirmed or made absolute. [ib. § 30.] The order is served by copy in the usual mode, by showing

(31) See Hoff. Mr. 377 8. 19. 157. 166. 130. 408.

(1) 2 R. S. 337. § 23. see § 22.
(2) ib. § 24.

the original, and if personal service cannot be made, such as is equivalent may be substituted. [see ib. § 35.]

§ 16. Proceedings on motion for committal for violating the order.

If the person against whom the order is made should after service of a copy thereof, commit any waste in violation of the order, he may be proceeded against and punished in the same manner as for the violation of an injunction to stay waste issued out of the court.(3) On complaint being made of the violation of the order, the court may order notice to be given to the person complained of, to show cause why he should not be committed, if from the circumstances of the case such order be deemed expedient.(4) This complaint may be on affidavit of the facts constituting such violation, and an application by motion on a regular motion day, [ch. 2. § 15.] or sooner if urgent, may be made, and an order granted thereon, [see ch. 2. § 12.] to show cause why he should not be committed; a copy of the order is then served in the usual manner, and on the day appointed, if on due proof by affidavit of the service, the party neglect to appear, an order absolute may be entered for the committal of the party, if the court be satisfied from the proof already exhibited that the order has been violated. But the party may appear in person or by solicitor and counsel [ch. 3. § 1.] and contest the motion upon affidavit, &c.

§ 17. Warrant of commitment security and discharge.

Upon satisfactory proof of such violation, the court will issue a warrant to the sheriff of the county, reciting such order and proof of violation thereof, and commanding him to commit such defendant to close confinement, for such term of time, not more than one year, as shall be deemed expedient. The sheriff will execute such warrant accordingly, and commit the person named therein, without allowing him the liberties of the jail.(6) The warrant may be superseded and the party discharged on an approved bond with sureties to the applicant against any waste, which if forfeited may be delivered to and prosecuted by the aggrieved party.(7) This supersedeas may be obtained by motion or petition, after service and notice in the usual manner. A reference thereupon may be ordered to take the bond and approve the sureties on due

(3) 2 R. S. 337. § 25. vid. ib. 534, &c. *post* ch. 6. 7.
(4) ib. § 26.
(6) 2 R. S. 337-8. § 27, 28.
(7) ib. § 29.

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notice to the party aggrieved, unless he approve at once the sureties proposed, and consent to an order for the discharge of the delinquent on the execution and filing of the bond. If the bond be forfeited, another motion or petition in the usual course is made or presented, and on sufficient proof by reference or otherwise of the commission of waste creating a forfeiture of the bond, an order may be obtained and entered for an assignment of the same, and the further proceedings would be an action on the bond in a court of common law.

3. INJUNCTION AND RECEIVER.

§ 18. Proceedings against corporations.

The proceedings against corporations, by injunction to restrain them from exercising franchises and privileges not granted to them is by bill filed by the attorney general (1) and the remedy by any creditor of a corporation seeking to charge the directors, trustees or other superintending officers of the corporation, or the stockholders thereof, on account of any liability created by law is also by bill.(2)

§ 19. Jurisdiction over officers of corporations.

But—1. The jurisdiction of the chancellor, over directors, managers and other trustees and officers of corporations, as defined by the legislature, viz: To compel them to account for their official conduct, in the management and disposition of the funds and property committed to their charge: To decree and compel payment by them, to the corporation whom they represent, and to its creditors, of all sums of money, and of the value of all property which they may have acquired to themselves or transferred to others, or may have lost or wasted, by any violation of their duties as such trustees: To suspend any such trustee or officer from exercising his office, whenever it shall appear that he has abused his trust: To remove any such trustee or officer from his office, upon proof or conviction of gross misconduct: To direct new elections to be held by the body or board duly authorised for that purpose, to supply vacancies created by such removal: In case there be no such body or board, or all the members of such board be removed, then to report the same to the governor, who shall be authorised, with the consent of the senate, to fill such vacancies: To set aside all alienations of property made by the trustees or other officers of any corporation, contrary to the provisions of law, or for purposes foreign to the lawful busi-

(1) 2. R. S. 462. (2) ib. 464-5.

ness and objects of such corporation, in cases where the person receiving such alienation, knew the purpose for which the same was made: and to restrain and prevent any such alienation in cases where it may be threatened, or there may be good reason to apprehend it will be made;(3) may be exercised, in all the cases thus enumerated, as in ordinary cases, on bill or petition, as the case may require or the chancellor direct, at the instance of the attorney general prosecuting in behalf of the people, or at the instance of any creditor of the corporation, or of any director, trustee or other officer thereof, having a general superintendance of its concerns.(4) 2. Whenever any corporation having banking powers, or having the power to make loans on pledges or deposits, or authorised by law to make insurances, shall become insolvent or unable to pay its debts, or shall have violated any of the provisions of its act or acts of incorporation, or of any other act binding on such corporation, the court of chancery may, by injunction, restrain such corporation, and its officers, from exercising any of its corporate rights, privileges or franchises, and from collecting or receiving any debts or demands, and from paying out, or in any way transferring or delivering to any person any of the moneys, property or effects of such corporation, until such court shall otherwise order.(5) 3. Whenever the directors, trustees or other officers having the management of the concerns of any corporation, or the majority of them, shall discover that the stock, property and effects of such corporation have been so far reduced by losses or otherwise, that it will not be able to pay all just demands to which it may be liable, or to afford a reasonable security to those who may deal with such corporation, or whenever such directors, trustees or officers, or a majority of them, shall, for any reason, deem it beneficial to the interests of the stockholders, that such corporation should be dissolved, they may apply to the court of chancery, by petition, for a decree dissolving such corporation, pursuant to the provisions of the statute.(6)

§ 20. Insolvent corporations.

§ 21. Voluntary dissolutions.

(3) 2 R. S. 461-3. vid. 1 R. S. 601, &c. see 3 R. S. act of 1829. The statutes do not extend to library, religious or school incorporations.

(4) ib. 2 R. S. 463.

(5) 2 R. S. 463-4. § 39.

(6) 2 R. S. 567. § 58.

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§ 22 Proceedings against insolvent corporations, and general provisions as to all corporations. On whose application. Receivers;—their liability, &c. See volume II. for forms and practical directions.

In case of insolvent corporations, the course of proceeding has been incidentally alluded to in a preceding chapter. [see ch. 2. § 12.] The injunction may be issued on the application of the attorney-general, in behalf of the state, or of any creditor or stockholder of such corporation, upon bill or petition, filed for that purpose, and upon due proof of any of the facts [§ 20.] herein before required, to authorise the issuing of the same.(7) Upon such application being made, and in any stage of the proceedings thereupon, the court may appoint one or more receivers, to take charge of the property and effects of such corporation, and to collect, sue for and recover the debts and demands that may be due, and the property that may belong to such corporation; who shall, in all respects, be subject to the control of the court.(8) The powers and authority, obligations and duties of receivers, and some other provisions in relation to the proceedings, particularly when brought by bill, are directed by the statute.(9) Whenever any bill filed, or application made against any corporation, its directors or other superintending officers, or its stockholders, according to the provisions of the statutes, the court may, by injunction, on the application of either party, and at any stage of the proceedings, restrain all proceedings at law, by any creditor, against the defendants in such suit; and whenever it shall appear necessary or proper, may order notice to be published, in such manner as the court shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the suit, within a reasonable time, not less than six months from the first publication of such order, and in default thereof, to be precluded from all benefit of the decree which shall be made in such suit, and from any distribution which shall be made under such decree.(10) Upon a final decree upon any such application to restrain a corporation, or upon bill filed against directors or stockholders, the court must cause a just and fair distribution of the property of such corporation, and of the proceeds thereof, to be made among its fair and honest creditors, in the order and in the proportions prescribed in the case of a voluntary dissolution of a corporation.(11)

§ 23. Staying proceedings at law.

Property how distributed.

(7) 2 R. S. 464. § 40.
(8) R. S. ib. § 41.
(9) See ib. 461. art. 2.
(10) ib. § 56.
(11) ib. 465. § 48.

§ 24. Proceedings to sequestrate corporate property and distribution thereupon.

Whenever a judgment at law, or a decree in equity, shall be obtained against any corporation, incorporated under the laws of this state, and an execution issued thereon shall have been returned unsatisfied in part or in the whole, upon the petition of the person obtaining such judgment or decree, or his representatives, the court of chancery may sequestrate the stock, property, things in action and effects of such corporation, and may appoint a receiver of the same.(12) Upon a final decree on any such petition, the court shall cause a just and fair distribution of the property of such corporation, and of the proceeds thereof, to be made among the fair and honest creditors of such corporation, in proportion to their debts respectively, who shall be paid in the same order as provided in the case of a voluntary dissolution of a corporation.(13)

§ 25. Proceedings by petition on the voluntary dissolution of corporations; Petition and affidavit. Contents of application to be annexed.

Whenever the application is made by petition of the directors and others, before mentioned, for a dissolution of the corporation, the application must contain a statement of the reasons which induce the applicants to desire a dissolution of the corporation, and there shall be annexed thereto a full, just and true inventory of all the estate, both real and personal, in law and equity, of such corporation, and of all the books, vouchers and securities relating thereto; a full, just and true account of the capital stock of such corporation, specifying the names of the stockholders, their residence when known, the number of shares belonging to each, the amount paid in upon such shares respectively, and the amount still due thereon, a statement of all incumbrances on the property of such corporation by judgment, mortgage, pledge or otherwise; a full and true account of all the creditors of such corporation, and of all engagements entered into by such corporation, which may not have been fully satisfied or cancelled; specifying the place of residence of each creditor and of every person to whom such engagements were made, if known, and if not known, the fact to be so stated; the sum owing to each creditor; the nature of each debt or demand; and the true cause and consideration of such indebtedness, in each case.(14)

To every such petition, which must contain the usual requisites, [see ch. 2. § 5-9.] there must also [see ib. § 7.]

(12) ib. 463. § 36.
(13) ib. § 37.
(14) 2 R. S. 467. § 59.

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§ 26. Presenting petition; filing same and order thereon to show cause before a master; publication of same, and proceedings before master and report.

be annexed an affidavit of the applicants, that the facts stated in such application, and the accounts, inventories and statements contained therein, or annexed thereto, are just and true, so far as such applicants respectively know or have the means of knowing.(15) The petition, affidavit and papers annexed, are presented to the court on a regular motion day as heretofore directed. [ch. 2. § 14, 15, 16.] Upon the petition, accounts, inventories and affidavit being filed, an order must be entered requiring all persons interested in such corporation, to show cause, if any they have, why such corporation should not be dissolved, before some master of the court, to be named in such order, at some time and place therein to be specified, not less than three months from the date thereof.(16) A certified copy of the order being obtained for the master designated therein; [ib. § 36.] notice of the contents of such order must be published, once in each week, for three weeks successively, in the state paper, and in a newspaper published in the county where the principal place of conducting the business of such corporation shall be situated.(17)

The publication is usually proved by the affidavit of the printers, with a copy of the notice annexed. On the day appointed in such order, such master must proceed to hear the allegations and proofs of the parties, take testimony in relation thereto, and with all convenient speed, report the same to the court, with a statement of the property, effects, debts, credits and engagements of such corporation, and of all other matters and things pertaining to the affairs of such corporation.(18) The master will be entitled to the use of the original petition and schedules annexed thereto, if he require the same, by an order on the clerk or officer of the court with whom they may be deposited, and must return the same with his report.(19) The examination and hearing before the master having been finished, and no exceptions to his report taken, it will be settled and signed. [see ch. 2. § 36-53.] Upon the coming in of the report, if it appear to the court that such corporation is insolvent, or that for any reason, a dissolution thereof will be beneficial to the stockholders,

(15) ib. § 60.
(16) ib. § 61.
(17) ib. § 62.
(18) ib. § 63. vid. ib. 403.
(19) ib. § 64.

§ 27. Receivers.

and not injurious to the public interest, a decree will be entered dissolving such corporation, and appointing one or more receivers of its estate and effects; and such corporation shall thereupon be dissolved, and shall cease.(20) Any of the directors, trustees or other officers of such corporation, or of any of its stockholders, may be appointed receivers, who, before entering upon the duties of their appointment, must give such security to the people of this state, and in such penalty, as the court shall direct, conditioned for the faithful discharge of the duties of their appointment, and for the due accounting for all monies received by them.(21) Such receivers will be vested with all the estate, real and personal, of such corporation, from the time of their having filed the security required, and will be trustees of such estate for the benefit of the creditors of such corporation and of its stockholders.(22)

§ 28. Decree of dissolution and appointment of receivers; appeal.

The authority, duties and powers of the receivers, and their proceedings in liquidating, settling, paying and distributing the estate of the corporation, are particularized by statute.(23) Any decree or order of the court of chancery, made upon any petition presented pursuant to these provisions of the statute, or in the course of any proceedings thereon, will be subject to an appeal, in the same manner as other orders and decrees of the court, if the same be made within six months after such order or decree made.(24) Upon entering an appeal the proceedings are conducted as before directed. [ch. 2. § 62. 66. 71.]

4. PARTITION.

§ 29. Petition for partition and sale.

The court has power upon petition or bill filed to decree partitions and sales of lands, tenements and hereditaments:(1) and any suits hereafter brought by petition or bill, or now pending by bill, are to be conducted in their future progress according to the following provisions.(2) When several persons shall hold and be in the

§ 24. Who may apply. Parties.

(20) ib. § 65. also, 469. § 38. See 456.
(21) ib. § 66.
(22) ib 469. § 67.
(23) 2 R. S. 469-472.
(24) ib. 472. § 90.
(1) 2 R. S. 329. § 79. 80. See 6 J. Ch. 436. 4 J. Ch. 276. 1 J. Ch. 111. 1 Hopk. 501.
(2) 2 R. S. 332 § 95. see 8 Cow. 366.

For forms & practical directions in partition, see vol. ii, ch. v. and ch. ix.

possession of any lands, tenements or hereditaments, as joint tenants, or as tenants in common, in which one or more of them shall have estates of inheritance, or for life or lives, or for years, any one or more of such persons, being of full age, may apply by petition for a division and partition of such premises, according to the respective rights of the parties interested therein; and for a sale of such premises, if it shall appear that a partition thereof cannot be made without great prejudice to the owners.(3) Every person whose rights are required to be set forth in the petition as hereinafter described, having any interest, wether in possession or otherwise, and every person entitled to dower in such premises, if the same has not been admeasured, may be made a party to such petition.(4) In case any one or more of such parties, or the share or quantity of interest of any of the parties be unknown to the petitioner, or be uncertain, or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be a contingent remainder, so that such parties can not be named, the same shall be set forth in such petition.(5) It shall not be necessary to make any creditor having a lien on the premises in question, or on any part thereof, by judgment, decree, mortgage or otherwise, a party to the proceedings, nor shall the partition of the premises alter, affect or impair the lien of such creditors;(6)except where the lien is on the undivided interest or estate of any of the parties, such lien, if partition be made of the premises, shall thereafter be a charge only on the share assigned to such party, and such share shall be first charged with its just proportion of the costs of the proceedings in partition, in preference to any such lien.(7) The state holding lands in common, may also be made party, services being made on the attorney-general.(8)

§ 30. Parties; minors; preliminary steps; notice to minors or their general guardian; preliminary petition for appointment of guardian and his bond.

The subject of parties in general, and the practical directions for searches, have been considered in a former chapter. [see ch. 3. § 17-19.] If it shall be represented to the court, by any party intending to make

(3) 2 R. S. 317. § 1. See 14 J. 354. 3 J. 459. 13. J. 116-117. &c. 12. J. 246. 248. 5 Cowen 295.

(4) 2 R. S 318. See 15 J. 319. 322. 8 J. 558. 5 J. 30. 2 Cowen 439. 440.

(5) 2 R. S. 318. § 7. See ante ch. 3. § 18.

(6) 2 R. S. ib. § 8. See 1 Hopk. 501.

(7) 2 R. S. ib. § 9.

(8) 2 R. S. 331-2. § 92. 1 ib. 207. § 65. see also 1 R. S. 357.

such application, that there are any minors who should be parties to the proceedings thereon, and it shall be satisfactorily proved to the court, that at least ten days' notice has been served on such minors as reside within this state, or upon their general guardians, of an intention to apply to the court for the order herein mentioned, the court will thereupon appoint a suitable and disinterested person to be guardian for one or more of such minors, whether the said minors shall reside in or out of this state, for the special purpose of taking charge of the interests of such minors in relation to the proceedings for a partition.(9) The application thus authorised may be by a petition ex parte, verified and presented in the usual manner. [ch. 2. § 5. &c. vid. ch. 4. § 28. ch. 5. § 2.] the guardians so appointed, and who must give bond as herein after directed, will represent their respective minors in the proceedings for partition, and their acts in relation thereto will be binding on such minors, and be as valid as if done by such minors after having arrived at full age.(10) Every guardian so appointed, must, before entering upon the execution of his duties, execute a bond, in such penalty, and with such surety, as the court shall direct, to the people of the state, conditioned for the faithful discharge of the trust committed to such guardian, and to render a just and true account of his guardianship, in all courts and places when thereto required; and before any rule to plead, or any other subsequent rule or order shall be made, the court shall be satisfied that such bond has been executed and filed in the office of its clerk.(11)

§ 31. The petition.

The petition, beside the usual requisites, [ch. 2. § 5-9.] and with a special reference to parties as before mentioned, must, for a partition or sale: 1. particularly describe the premises sought to be divided or sold; 2. set forth the rights and titles of all persons interested therein, so far as the same are known to the petitioner, including the interest of any tenant for years, for life, by the curtesy, or in dower, and the persons entitled to the reversion, remainder or inheritance after the termination of any particular estate therein, and every person who, by any

(9) 2 R. S. 317, § 2. See 1 J. 509.
(10) R. S. ib. § 3.
(11) ib. § 4. See proceedings for appointment of general guardian ch. 4. and special guardian ch. 5 ante.

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contingency contained in any devise, grant or otherwise, may be or become, entitled to any beneficial interest in the premises; and, 3. be verified by affidavit.(12) In every bill or petition for the partition of lands, it shall be the duty of the complainant to state in as concise a manner as possible the rights and interests of the respective parties in the premises, and the several liens and incumbrances thereon, so far as the same are known to him, and if the rights of any of the parties are unknown to him, he shall state the same according to his information and belief; and every such bill or petition shall be verified by the oath of the complainant in the usual manner. It shall also be the duty of the complainant, on filing such bill or petition, to file with the clerk of the proper county the notice required by law to render the commencement of the suit constructive notice to subsequent purchasers.(13) Where several tracts or parcels of land lying within this state are owned by the same persons in common, no separate bill or petition for the partition of a part thereof only shall be brought without the consent of all the parties interested therein; and if brought without such consent, the share of the complainant may be charged with the whole cost of the proceeding.(14)

All lands held in common, to be embraced in one suit.

§ 32.

As to copies of petition, notice of presenting, and of motion and how directed and served, & where the state is a party.

The general mode of service of petitions, &c. has been directed in a preceding chapter.[ch. 2. § 10-15.] In the present case: A copy of such petition, with notice that the same will be presented to the court on some certain day in term, must be served forty days previous to such term, on all the parties interested in such lands or tenements, who shall not have joined in such petition, and on the guardians of such as are minors, who shall have been appointed in the manner herein before directed.(15) The notice of the application must be directed to all the parties who are known and whose interests are known, and to those who are known but whose interests are uncertain, contingent or unknown, by name, and generally to all others unknown, having or claiming any interest in such premises.(16) Where the state is made party, the petition and notices required to be served in other cases,

(12) 2 R. S. 318. § 5-9. See 2 Caines 169. 5 J. 80. 4 J. 202. 5 Cowen 295.
(13) R. 174.
(14) R. 175.
(15) 2 R. S. 318. § 10. 5 Cowen 281. 1 Caines 7. 20.
(16) 2 R. S. 319. § 11.

must be served on the attorney general, who will appear in behalf of the state.(17)

§ 33. Do. in case of unknown parties or non residents or concealed publication or actual service in lieu.

If any parties, having such interest, are unknown, or if either of the known parties, whether minors or of full age, reside out of this state, or cannot be found therein, and such facts be made to appear to the court by affidavit, the petition and notice may be served on such unknown or absent party, by publishing the same for three months previous to the presentation of such petition, once in each week, successively, in the state paper and in a newspaper printed in the county where the premises are situated, if there be any, and if there be none, then in a newspaper printed in the city of New-York, which shall be equivalent to a personal service on such known or unknown parties. Or instead thereof, with respect to any known absent party, such petition and notice may be served personally, out of this state, forty days previous to its presentation, without publishing the same.(18)

§ 34. Proceedings on presenting petition, proof of service, or publication or service, order thereon for defendants to *appear* and show title and *answer* the petition in the usual time for pleading.

Upon the presentation of the petition [vide ch. 2. § 14-17.] with due proof by affidavit [ib. § 7.] of service, or publication with notice, and of the facts justifying the mode of publication, or if served out of the state in lieu of publication, by an affidavit of that fact duly taken and authenticated;[see ch. 2. § 7.] the court will, by rule, order the parties interested in the premises, and who did not join in such petition, whether known or unknown, and whether the share or interest is known or unknown, or whether they are, or may become entitled to any beneficial interest in the premises in reversion, remainder, or by any executory devise, contingency or otherwise, to appear and show title to the proportions which they may claim of the premises set forth in the said petition, and to answer the said petition within the usual time allowed for pleading in the said court.(19) The order in this case, as no distinct rule for appearance(20) seems necessary as in case of ordinary suits by bill, would be, that they appear and answer within forty days(21) after notice of the same, or that the petition be taken as confessed.

(17) 2 R. S. 332. § 95.
(18) ib. 319. § 12.
(19) 2 R. S. 319. § 13. see 9 J. 92. 270. 4 J. 202. 3 J. 8. 331. 388. 459. 2 J. 180. 482. 1 Caines 121. 4 Cowen 483.
(20) see R. 22, 23.
(21) See R. 24.

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§ 35. Pro confesso, and orders thereon.

The petition may be taken as confessed, [see ch. 2. § 25.] as on judgment by default in the supreme court, but according to the usual practice in other cases in chancery.(22) The order [ib. § 27. 28. 32.] is entered in the appropriate office [ib. § 33-4] of register, assistant register, or clerk; but notice thereof and all other notices unless otherwise specially directed may be served by affixing the same in the office, which will be equivalent to personal service,(23) unless parties appear by solicitor [see ch. 2. § 10. 11. 13.] when the service is to be made on him, or if on his agent, then for double the usual time. [ib. § 13.] If no answer be filed and served by copy within that time or within a further time [ib. § 18. 19.] if allowed, an affidavit of the default may be filed and an order entered accordingly.(24) If the default of any of the defendants, whether known or unknown, shall have been entered, the court shall require the petitioners to exhibit proof of their title, and an abstract of the conveyances by which the same is held. Such proof may be taken in open court, or on a reference for that purpose. And in either case, the proof given and the abstract furnished, shall be filed with the clerk.(25)

Reference of course where there is no defence.

Where the rights and interests of the several parties as stated in the bill or petition are not denied or contested, if any of the defendants are infants, and have put in the usual answer by their guardian, or the bill or petition has been taken as confessed against all or any of the parties to the suit or owners of the premises, whether known or unknown, the complainant, on filing an affidavit of the fact, may have an order of course referring it to a master to take proof of the complainant's title and interest in the premises, and of the several matters set forth in the bill or petition, and to ascertain and report the rights and interests of the several parties in the premises, and whether the premises or any part thereof are so circumstanced that a partition thereof cannot be made without great prejudice to the owners.(26) [See reference ch. 2 § 36, &c.] On the coming in and confirmation of the report of the master, if it appears that a sale of the premises or any part thereof is necessary, any party in the suit may have an order of course requiring the

Reference of course to ascertain incumbrances, if lands cannot be divided.

(22) 2 R. S 330. § 82.
(23) ib 319. § 14.
(24) R. 24.
(25) 2 R. S. 321. § 22.
(26) R. 177. see 1 Hopk. 501.—Hoff. Mr. 177-8.

register, assistant register or clerk, to ascertain and report whether the shares or interests in the premises of the parties, or any of them, are subject to any lien or incumbrance by judgment, decree, mortgage, or otherwise, and to make the necessary searches for that purpose; and his report shall be procured before any order for the sale of the premises is made.(27)

§ 36. Appearance and answer; pleadings and issue. Who may defend.

Any person having any interest in the premises, or having any claim by which he may become interested at any future time, in reversion, remainder, or by any executory devise, contingency or otherwise, and whether such interest be present and vested or contingent, and whether such parties or their interest be known or unknown, may, within the time before prescribed, or within such further time as the court may allow for the purpose, appear and answer to the said petition as to a declaration. If such person be not named as a party in the petition, he may be admitted to appear and answer the same, as a defendant, by the court upon his petition accompanied by an affidavit of his interest.(28) The proceedings on behalf of the parties adverse to the application, may, before answer or plea, be in many respects similar to those which will be particularly detailed in a subsequent chapter [ch. 8.] in the ordinary course of proceedings by bill; the preliminary proceedings mentioned in prior chapters, [3. 4.] having reference to the prosecution rather than defence of original petitions and bills. [but see ch. 3. § 1, 2, 3. 11. and ch. 4. § 23. and § 2. ch. 2. § 18.] In the present proceedings, if the rights and interests of the several parties are truly stated in the bill or petition for partition, it will be sufficient for the defendants to put in a general answer, admitting the rights and interests of the parties in the premises to be as stated in the complainant's bill or petition; and no solicitor will be allowed on the taxation of costs for any more than three folios contained in any such answer.(29) But any party appearing, may plead either separately or jointly, with one or more of his co-defendants, that the petitioners or any of them, at the time of presenting such petition, were not in the possession of the premises in question, or any part thereof; or that the defendants

The defendants may put in general answer.

Plea of defendants, &c.

(27) R. 178. 2 R. S. 324. § 41.
(28) 2 R. S. 319. § 15.
(29) R. 176.

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or any of them did not hold the premises together with the petitioners, at the time of the commencement of the proceedings, as alleged in the petition. Replications and further pleadings may be had between the parties respectively, according to the practice of the court, until an issue or issues in law, or in fact, be joined between the said parties, or some of them.(30)

§ 37.

Rights of parties to be ascertained, &c.

If a general answer be put in, as before observed, a reference thereon to take proof of title, &c. as well as upon default, may be ordered of course. The court must ascertain, from the proofs so taken, in case of default, confession of parties who appear, verdict of jury by which any issue of fact is tried, and must declare the rights, titles and interest of the parties to such proceedings, plaintiffs as well as defendants, so far as the same shall have appeared; determine the rights of the said parties in such lands, tenements or hereditamente, and give judgment that partition be made between such of them as shall have any right therein, according to such rights.(31)

Denial of co-tenancy by defendant.

Whenever the joint tenancy or tenancy in common, of any defendant shall be denied by a co-defendant, and it shall become necessary to determine the same, in order to effect a complete and final partition, so far as the rights of the parties are concerned, the court may direct an issue to be formed for that purpose; and award one or more issues to try any fact contested by the parties;(32) and either before or after trial of any such issue, the court may permit the petition and all subsequent proceedings to be amended, so as to represent truly the rights claimed by any party.(33) The court may allow any amendment of the pleadings or proceedings, so as to make defendant thereto, any person who shall have appeared in the course of the proceedings, to be interested in the premises, by any will, deed or grant from any person who is a defendant in such partition, and who might originally have been made defendant, if his interest had then existed or been known; but no person shall be so made defendant without forty days' notice of

Award of issues.

Amendment.

New parties.

(30) See further 2 R. S. 320. § 16, 17. 4 Cowen 483. 17 J. 221. 4.

(31) 2 R. S. 321. § 23. see 5 Cowen 295. 17 J. 221. 4.

(32) 2 R. S. 320. § 18. 330. § 61. see ante ch. 2. § 54. as to issue at law, &c. see further R. S. ib § 19.

(33) R. S. ib. § 19.

the motion to that effect being personally served on him, or published three months, as in the case of an original application.(34) After any such amendment, any party whose rights are affected thereby, and who has not had an opportunity to sustain his claim, shall be entitled to have an issue made up and tried, to determine such right; and the court may, after an amendment in any other case, where it may be deemed proper, order a trial to be had.(35)

The practice in setting down the cause for hearing on issue upon petition and answer, or on pleadings, where the rights of the parties are denied or contested; [ante § 35.] reference thereupon ;(36) exception to master's report on title ; award of issue at law ;(37) trial of that issue ; [ante ch. 2. § 54.] setting down the cause on master's report, or on return of postea and judge's certificate after trial at law, and other proceedings, until the decretal order for partition or sale, are similar to the proceedings upon bill as detailed in a subsequent part of the treatise. [see post ch. 8, 9.]

1. SALE BY MASTER.

§ 38. Sales may be by master; orders prior to order for sale, viz. to prove title, &c to ascertain incumbrances.

When the title and interest of the petitioner, the truth of the matters set forth, the rights and interests of the parties, and the condition of the premises, are ascertained, if it appear that a sale of the whole or part is necessary, [ante § 35.] and that partition, with compensation for equality cannot be made as hereafter directed, a sale will be decreed after the outstanding incumbrances shall have been ascertained by the register, assistant register or clerk, as before directed.[§ 35.] The order for this purpose being entered, the clerk or other officer to whom the reference is made will immediately cause the necessary searches to be made, in all proper offices in which incumbrances may by law be docketed, filed, registered or recorded, and shall report, with all convenient speed, the names of the creditors, the nature of the incumbrances, the dates thereof, and the se-

(34) ib. § 20.
(35) ib. § 21.
(36) See 1 Hopk. 501. Hoff. Mr.
(37) See 5 Cowen 711. 177-8.

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§ 39. Order for sale; what it contains; as to terms of credit; separate securities, incumbrances, and sales of dower or other life estate.

veral amounts appearing to be due thereon. The fee and expenses of searches, shall be advanced by the petitioners.(37) Instead of appointing commissioners, in the first instance, to make partition, if it shall appear by the report of a master or otherwise, that the premises, or any part of them, are so circumstanced that a partition thereof cannot be made without great prejudice to the owners, the court may order a sale of such premises at public auction, by one of the masters, and on the master's report being confirmed, he must execute conveyances to the purchasers at such sales, which will have the same effect as if executed by commissioners, according to the provisions of the statute.(38) The court will direct, in such order, the terms of credit which may be allowed, for any portions of the purchase money of which it shall think proper to direct the investment, and for such portions of such purchase money, as are required by the provisions hereinafter contained, to be invested for the benefit of any unknown owners, any infants, any parties out of the state, or any tenants for life, in dower or by the curtesy.(39) The portions of the purchase money for which credit shall have been so allowed, shall always be secured at interest, by a mortgage of the premises sold, by a bond of the purchaser, and by such other security as the court shall prescribe. Separate mortgages and other securities may be taken for such convenient shares or portions of the purchase money, as are directed by the court to be invested in the name of the clerk of the court and his successors in office, or of any one of such clerks, and for such shares as any known owner of full age shall desire to have so invested, in the names of such owners.(40) Upon such sales being confirmed as hereinafter mentioned, such mortgages or other securities must be delivered to the clerk of the court, or to the known owners whose shares were so invested.(41) If it appear by report upon search on reference, as before directed [§ 36.] that there are any ex-

(37) 2 R. S. 324. § 43.
(38) 2 R. S. 330. § 81. see 8 Cowen 377.
(39) ib. 223. § 38.
(40) ib § 39, 40.
(41) ib. 324. § 41.

isting incumbrances upon the estate or interest in the premises of any party named in the proceedings in the suit, the court will, in the order of sale, direct the master to bring into court, and pay to the clerk thereof, the portion of the monies arising from the sale of the estate and interest of such party, after deducting the portion of the costs, charges and expenses to which it shall be liable.(44) Whenever the estate of any tenant in dower, or by the curtesy, or for life, to the whole or any part or share of the premises in question, has been admitted by the parties, or ascertained by the court, to be existing at the time of the order for such sale, and the person entitled to such estate has been made a party to the proceedings, the court will first consider and determine, under all the circumstances of the case, whether such estate ought to be excepted from such sale, or whether the same should be sold; and in making such determination, will have regard to the interests of all the parties.(45) If a sale of the premises including such estate, shall be ordered, the estate and interest of every such tenant or person will pass thereby; and the purchaser, his heirs and assigns, will hold such premises free, and discharged from all claims by virtue of any such estate or interest, whether the same be to any undivided share of a joint tenant, or tenant in common, or to the whole or any part of the premises sold.(46)

§ 40. Sales how noticed and conducted; who may not purchase; report confirmation; conveyances.

The master must give notice of any sale to be made by him, for the same time and in the same manner as is required by law on sales of real estate by sheriffs on execution. The terms of such sale must be made known at the time; and if the premises consist of distinct buildings, farms or lots, they shall be sold separately. Neither the said master, nor any person for his benefit, can be interested in the purchase, nor directly or indirectly purchase any of the premises sold, nor can any guardian of any infant party in such suit, purchase, or be interested in the purchase of any lands being the subject of such suit, except for the benefit or in behalf of such infant; and all sales contrary to this provision will be void.(47)

(44) ib. § 44.
(45) ib. 325. § 50.
(46) ib. § 51. see 2 Cowen 439-40.
15 J. 319. 322. 8 J. 558. 5 J. 80.
(47) ib. 326. § 56-58. vide 8 Cowen 362.

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After completing such sale, the master will report the same to the court, with a description of the different parcels of land sold to each purchaser, the name of such purchaser, and the price bid by him. On the report being filed and the sale approved and confirmed, an order will be entered directing conveyances pursuant to such sales.(48) Such conveyances so executed, must be recorded in the county where the premises are situated; and will be a bar, both in law and equity, against all persons interested in such premises in any way, who shall have been named as parties in the said proceedings; and against all such persons and parties, as were unknown, if notice shall have been given of the application for partition, by such publication as is herein before directed; and against all other persons claiming from such parties, or either of them(49)

§ 41. Proceeds;—distribution; payment; investment. 1 Costs.

The costs and expenses of the proceedings will be deducted from the proceeds and in the first instance paid to the petitioners or their solicitor.(50) If it has appeared by report [see § 35. 38.] that there were existing incumbrances upon the interest of a party named in the proceedings, and the master has brought the money into court pursuant to the order as before directed;[§ 39.] such party may apply to the court to order such moneys, or such part thereof as he shall claim, to be paid to him; which application must be accompanied 1. by his own affidavit, stating the true amount actually due on each incumbrance, and his residence, as far as known to such party; 2. by proof, by affidavit, of the due service of a notice on each owner of any incumbrance, of the intention to make such application, at least fourteen days previously. If such owner reside in this state, the notice must be served personally, or if he be absent from his residence, by leaving a copy there, with some person of proper age. If the owner reside out of the state, the notice may be served on him personally, twenty days previously or by publishing the same in the state paper four weeks successively, once in each week.(51)

2. Incumbrances

Upon such application and proof of notice being made, the court will proceed to hear the proofs and allegations of the parties. If any question of fact shall arise, which, in the opinion of the court, cannot be satisfactorily determined without a trial by jury, the court will

(48) ib. 326.7. 330.
(49) ib. 327. § 61. 13 J. 488-9.
(50) ib. 327. § 62.
(51) ib. 324. § 45.

award a feigned issue, to be tried as in other cases. The costs of such trial must be paid by the party failing; which payment will be enforced by attachment, as in other cases. [ch. 2. § 21.] When the amount of existing incumbrances shall have been ascertained, the court will proceed to order a distribution of the moneys so brought into and remaining in court, among the several creditors having such incumbrances, according to the priority thereof respectively. The clerk or other officer of the court by whom any such incumbrance shall be paid off, must procure satisfaction thereof to be acknowledged, in the form required by law, and cause the incumbrance to be duly satisfied or cancelled of record, and may defray the expenses thereof out of the portion of the moneys in court belonging to the party by whom such incumbrance was payable. The proceedings to ascertain and settle the amount of incumbrances as herein provided, will not affect any other party in such suit for partition, nor delay the paying overor investing of moneys to or for the benefit of any party upon whose estate in the premises there shall not appear to be any existing incumbrances.(52)

§ 42. 3. Dower or life estate; if sold; how paid in gross on principle of annuities or invested & in what proportions.

If dower or other life estate has been included in the order for sale as before directed, [§ 39.] upon the sale being made of any such interest or estate, the court will direct the payment of such sum in gross, out of the proceeds thereof, to the person entitled to such estate in dower, tenancy by the curtesy, or tenancy for life, as shall be deemed, upon the principles of law applicable to annuities, a reasonable satisfaction for such estate or interest, and which the person so entitled shall consent to accept in lieu thereof, by an instrument under seal, duly acknowledged or proved in the manner that deeds are required to be proved, to entitle them to be recorded. In case no such consent be given at or before the coming in of the report of sale by the master, then the court will ascertain and determine what proportion of the proceeds of such sale, after deducting all expenses, will be a just and reasonable sum to be invested for the benefit of the person entitled to such estate or interest in dower, by the curtesy, or for life; and will order the same to be brought into court for that purpose. The proportions of the proceeds of such sale, must be ascer-

(52) ib. 325. § 46-49.

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tained and determined, in the several cases as follows: 1. If an estate in dower shall have been included in such order of sale, its proportion will be one third of the proceeds of the sale of the premises, or of the sale of the undivided share in such premises, upon which such claim of dower existed: 2. If an estate by the curtesy, or other estate for life, shall be included in the order of sale, its proportion will be the whole proceeds of the sale of the premises, or of the sale of the undivided share thereof, in which such estate shall be: And in all cases, the proportion of the expenses of the proceedings will be deducted from the proceeds of such sale. If the persons entitled to any such estate in dower, by the curtesy or for life, be unknown, the court will take order for the protection of the rights of such persons, in the same manner, as far as may be, as if they were known and had appeared.(53) By a general rule of the court:

Whenever a party, as tenant for life, or by the curtesy, or in dower, is entitled to the annual interest or income of any sum paid into court and invested in permanent securities, such party shall be charged with the expense of investing such sum and receiving and paying over the interest or income thereof; but if such party is willing, and consents to accept a gross sum, in lieu of such annual interest or income for life, the same shall be estimated according to the then value of an annuity of six per cent. on the principal sum during the probable life of such person, according to the Portsmouth or Northampton tables.

§ 43
4. Further distribution of proceeds among parties, infants, or absent or unknown, tenant in dower, &c. how invested or paid; security ro refund.

(54) The proceeds of every such sale, after deducting the costs, must be divided among the parties whose rights and interests shall have been sold, in proportion to their respective rights in the premises; and the shares of such of the said parties as are of full age, must be paid to them or their legal representatives, by the master or must be brought into court for their use. Where any of such known parties are infants, the court may in its discretion, direct the share of such infant to be paid over to the general guardian, or to be invested in permanent securities at interest, in the name and for the benefit of such infant. Where any of the parties whose interests have been sold, are absent from the state, without legal representatives in this state, or are not known or named in the proceedings, the court will di-

(53) ib. 525-6. § 52-55. (54) R. 179.

rect the shares of such parties to be invested in permanent securities at interest, for the benefit of such parties, until claimed by them or their legal representatives. Where the proceeds of a sale, belonging to any tenant in dower, or by the curtesy, or for life, shall be brought into court, as herein before directed, the court will direct the same to be invested in permanent securities at interest, so that such interest shall annually be paid to the parties entitled to such estates, during their lives respectively. The court may, in its discretion, require all or any of the parties, before they shall receive any shares of the moneys arising from such sale, to give security to the satisfaction of such court, to refund the said share with interest thereon, in case it shall thereafter appear that such party was not entitled thereto. Where any security is directed to be taken by a court, or any investment to be made, or any security shall be taken by a master on the sale of any real estate as herein before directed, except where provisions shall be made for taking the same in the name of any known owner, the bonds, mortgages, or other evidences thereof must be taken in the name of the clerk of the court, and his successor in office, who will hold the same by virtue of their respective officers, and must deliver them to their successors. Such clerks must receive the interest or principal of any sums as they become due, and apply or re-invest the same according to the circumstances of the case, as the court shall direct; and must, once in every year, render to the court an account in writing, and on oath, of all moneys received by them, and of the application thereof; and upon any neglect to render such account, and upon any misapplication of any moneys received, the court must suspend such clerk from exercising the duties of his office, and immediately report his delinquency to the governor, to the end, that he may be removed by the governor and senate. All investments and re-investments under the provisions of this title, must be made in the public stocks of the United States, or of this state, or on bond and mortgage upon unincumbered real estate, of at least double the value of such investment; and no such security, bond, mortgage, or other evidence of such investment, can be discharged, transferred or impaired, by any act of the clerk, without the order of the court, entered in the minutes thereof. Any person interested in such investments or securities, may, with the leave of

§ 44. In what names securities to be taken clerk, register, &c. to receive money and to account; investments where and how made secured and prosecuted.

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the court, prosecute the same in the name of the existing clerk; and no suit shall be abated by the death, removal from office, or resignation of the clerk to whom such evidences were executed, or of any of his successors.(55)

2. PARTITION.

§ 45

2. Partition by commissioners. See *forms* and *practical directions*, post, vol. II. ch. V. X.

If on report of master or otherwise it appear that the premises may be partitioned, and partition be decreed, the court will by order appoint three reputable freeholders, commissioners, to make the partition so adjudged, according to the respective rights and interest of the parties, as the same were ascertained and determined by the court; and in such order the court will designate the part or shares which shall remain undivided, for the owners whose interests shall be unknown and not ascertained.(56) If the persons so appointed commissioners, or either of them, shall die, resign or neglect to serve, the court may, from time to time, appoint others in their places. The commissioners, before proceeding to the execution of their duties, must severally be sworn or affirmed, before any officer authorised to take affidavits, honestly and impartially to execute the trust reposed in them, and to make partition, as directed by the court; which oath must be filed with the clerk of the court, at, or before, the coming in of the report of such commissioners. The commissioners must forthwith proceed to make partition, according to the decree or order of the court.(57) In making partition, the commissioners must divide the said real estate, and allot the several portions and shares thereof to the respective parties, quality and quantity relatively considered by them, according to the respective rights and interests of the parties so adjudged by the court, designating the several shares and portions by posts, stones, or other permanent monuments; and they may employ a surveyor, with the necessary assistants, to aid them there-

(55) 2 R. S. 327-8. § 63-71.
(56) 2 R. S. 321 § 25. see 5 Cowen, 298. 8 ib. 377.
(57) See ib. 321-2. § 25-28.

☞ *The phraseology of the statute has been necessarily changed in applying "the like proceedings" of the Supreme Court to this court.—See 2 R. S. 329. § 80.*

in.(58) All the commissioners must meet together in the performance of any of their duties; but the acts of a majority so met, will be valid. The expenses of the commissioners, including the expenses of a surveyor and his assistants, when they shall be employed, will be ascertained and allowed by the court; and the amount thereof, together with the fees allowed by law to the commissioners, must be paid by the petitioners, and will be allowed to them as part pay of the costs to be taxed. (59)

§ 46. Report of commissioners.

The commissioners must make a full and ample report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their trust, and describing the land divided and the shares allotted to each party, with the quantity, courses and distances of each share, and a description of the posts, stones or other monuments thereof, and the items of their charges.(60) The report must be proved or acknowledged before some officer authorised to take the proof of deeds, in the same manner that deeds are required to be proved or acknowledged, to entitle them to be recorded, and must be filed in the office of the clerk of the court. On good cause shown, the court may set aside the report, and appoint new commissioners as often as may be necessary, who shall proceed in like manner as above directed.(61.)

§ 47. Confirmation of proceedings; report; decree; effect thereof.

Upon any report of the commissioners being confirmed by the court, a decree will thereupon be given, that such partition be firm and effectual forever, and such decree will be binding and conclusive; 1. On all parties named therein, and their legal representives, who shall, at the time, have any interest in the premises divided, as owners in fee, or as tenants for years, or as entitled to the reversion, remainder or inheritance of such premises after the termination of any particular estate therein; or who, by any contingency contained in any will or grant or otherwise, may be or may become entitled to any beneficial interest in the premises; or who shall have any interest in any undivided share of the premises, as tenant for years, for life, by the curtesy, or in dower; 2.

(58) 2 R. S. 322. § 29.
(59) R. S. ib. § 31-2. see 8 Cowen 115. 5 Cowen 215. 213.
(60) ib. § 33. 30.
(61) ib. § 33. 34.

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On all persons interested in the premises, who may be unknown, to whom notice shall have been given of the application for partition, by such publication as is herein before directed; and, 3. On all other persons claiming from such parties, or persons or either of them. But such decree and partition will not affect any tenants, or persons having claims as tenants, in dower, by the curtesy or for life, to the whole of the premises which shall be the subject of such partition; nor will such decree and partition preclude any person except such as are specified in the last section, from claiming any title to the premises in question, or from controverting the title or interest of the parties, between whom such partition shall have been made.(62)

Persons and cases not affected.

§ 48.

But the rights, titles and interest of the parties must, as in case of sale, be ascertained as before directed;[§ 36-38.] and if after the trial of any such issues, or after decree pro confesso, by admission or otherwise, against those parties who are known, the part or interest of any parties who shall not have pleaded in the cause, whether known or unknown, in and to such premises, shall not have appeared by the evidence in the cause, then the said court give judgment that partition be made, so far as the rights or interests of the parties who are known, and who have appeared in the said cause, have been ascertained, and the residue of the premises shall remain for the parties whose interests have not been ascertained, subject to division between them at any future time.(63) Whenever partition shall be decreed by the court, if it shall appear that it cannot be made equal between the parties, without prejudice to the rights and interests of some of them, the court may decree compensation to be made by one party to the other, for equality of partition, according to the equity of the case. The final decree of this court for the partition or sale of any premises, made upon such petition and proceedings aforesaid, and every partition or sale made thereupon, shall be binding and conclusive on all parties named in the said proceedings, and on all parties interested in the premises, who or whose interest may be unknown, and their legal representatives, and all claiming under them, as if such sales, partition and proceedings had taken place,

But the rights titles, &c. must be also ascertained before decree for partition; decree of compensation for equality; final decree, appeal; costs.

(62) 2 R. S. 322-3. § 35-36. see 13. J. 488-9. 2 Cowen 439, 440. 15 J. 319. 322.

(63) R. S. ib. § 24.

and judgment had been rendered thereon in the supreme court, under the foregoing provisions.(64) Any party to such decree, and any party interested in the premises, though not named in the pleadings, who would be entitled to bring a writ of error, if the proceedings were in the supreme court, may appeal from any decree or order of the said court, upon any such proceedings, within the same time and under the like regulations, as in other cases.(65) [see *ante* ch. 2. § 62.]

When final decree for partition shall be rendered, the court will also adjudge each of the parties concerned therein, other than the petitioners, to pay to such petitioners a proportion of the costs and charges of the proceedings, to be ascertained by the court, according to the respective rights of the parties, and the proportion of such costs assessed upon the unknown owners, to be chargeable on the part remaining undivided; and upon such decree, execution may issue as in other cases, and may be levied on the property of the parties respectively charged with such costs, and upon any share or part of the premises allotted on any such division, to any owner unknown or not named, and upon every portion remaining undivided, for the proportion adjudged to be paid by such owners or chargeable to the part remaining undivided. And a sale of such premises thereupon will be as valid as if such unknown owner had been named in the proceedings and in such execution. If the petition be dismissed voluntarily, or for want of prosecution, [ante ch. 2. § 80.] or a verdict on issue awarded pass against the petitioners or a decree be rendered against them on demurrer, they must pay costs, to be recovered and collected as in other cases.(66)

5. TRUSTEES.

Trustees of an express trust.

§ 49. Petition of persons interested in an express trust for appointment of new trustee on death of the trustee, the trust vesting in chancery.

On death of the surviving trustee of an express trust, the estate shall not descend to his heirs nor pass to his representatives; but the trust if then unexecuted, shall vest in the court of chancery with all the powers and duties

(64) 2 R. S. 330. § 83. § 84. see 3 J. Ch. 296.

(65) ib. § 85. see ib. 329 & 6 Cowen 611.

(66) See 2 R. S. 328-9. § 72-73. 613. see 3 J. Ch. 306. see note under § 45. *ante*.

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§ 50. Petition of any trustee of an express trust to accept his resignation and discharge him from the trust and appointment of new trustee thereupon.

of the original trustee, and shall be executed by some person appointed for that purpose under direction of the court.(1) In cases of express trust:(2) 1. On the petition of any trustee the court of chancery may accept his resignation and discharge him from the trust, under such regulations as shall be established by the court for that purpose, and upon such terms as the rights and interests of the persons interested in the execution of the trust may require.(3) 2. Upon the petition or bill of any person interested in the execution of a trust, and under such regulations as for that purpose shall be established, the courtof chancery may remove any trustee who shall have violated, or threatened to violate his trust, or who shall be insolvent, or whose insolvency shall be apprehended, or who, for any other cause, shall be deemed an unsuitable person to execute the trust.(4) 3. Chancellor may appoint a new trustee in place of trustee so resigned or removed, and when, in consequence of such resignation or removal there shall be no acting trustee, the court in its discretion, may appoint new trustees, or cause the trust to be executed by one of its officers under its direction.(5)

§ 51. Petition by any interested for removal of an insolvent or unsuitable trustee of an express trust & appointment of new trustee thereupon.

6 INTESTATE SURPLUS IN STATE TREASURY.

§ 52. Petition by claimants of intestates' estate which public administrator had administered upon and paid over to the state treasury.

Any person claiming as creditor, legatee or next of kin, any monies paid into the state treasury by any county treasurer acting as public administrator of his county pursuant to the statute(6) may present a petition to the chancellor praying that such monies may be paid to him.(7) The petition is drawn addressed and verified [as directed ch 2 § 5-9] but instead of the usual services [ib § 10-11] a copy of the petition and notice of the motion for a regular motion day [ib § 14-15] must in this case(8) be served on the attorney general fourteen days previously to the time when the same shall be presented to the chancellor. An affidavit [see ib § 7. 17] of service of copy is annexed to the original petition, and pre-

(1) 1 R. S. 730. § 68.
(2) See ib. 728-9. 731. § 72.
(3) ib. 730. § 69.
(4) ib. § 70.
(5) ib. § 71.
(6) 2 R. S. 117. 123.
(7) ib. 133. § 74
(8) ib.

sented on the day noticed [see ib. § 16.] by the petitioner if he proscute in person [ch. 3. § 1-2.] or his solicitor. If the attorney general do not attend, the petition will be taken as confessed;[ch. 2. § 25.] but still the chancellor may make such order as he may judge expedient to ascertain the rights of the claimant by reference, award of issue, or otherwise.(4) If by reference a certified copy of the order entered with the register or assistant register on filing the petition, &c. is served on the master, and the proceedings are as directed [ch. 2. § 36.]summonses for attendance in this case being served on the attorney general. If an issue be awarded the claimant proceeds as directed. [ch.2 § 54.] On procuring the report of the master or on the coming in of the postea and verdict of the judge before whom the issue was tried, [see ib. § 55.] the cause is set down and noticed for a hearing on a regular motion day. If no questions arising from the reference are to be previously disposed of, if no new trial be applied for, the chancellor may on motion order a confirmation of the report or verdict, aud by an order direct that the amount claimed and ascertained to be due, be paid to petitioner without interest, and subject to a deduction therefrom of all expenses incurred by the state in relation to such balance paid into the treasury.(5) On this order, which is final, or if the petition be dismissed on hearing, and an order entered accordingly [ch. 2. § 32-3.] a rehearing [ch. 2. § 56.] may be applied for, or an appeal [ch. 2. § 62.] entered, and the cause be finally disposed of pursuant to the decree of the court of errors. [ch. 2. § 79.] No costs in this case are allowed the claimant, and no enrolment of the decree is necessary. But on the production of a certified copy [see ch. 2. § 9.] of the order for payment, the comptroller will draw a warrant on the treasurer for the amount which will be paid accordingly(6)

7. DISCOVERY OF PERSONS, &c.

§ 53. Petition, &c. to discover the death of persons upon whose lives any particular estate depends.

Any person entitled to claim any lands or tenements, after the death of a person having any prior estate therein, may, once a year, apply by petition, to this court for an order, that the person upon whose life such prior estate depends, be produced and shown, as herein after

(4) ib. § 75.
(5) See ib. § 75.
(6) ib R. S. § 30.

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Petition and affidavit, &c.

provided, by the guardian, husband, trustee, or party who may have the custody of such other person, or of his estate, or who may be entitled to such custody.(1) The petition in addition to the usual requisites [ch. 2. § 5-9.] must state the interest of such applicant in the lands or tenements described therein; and that he has cause to believe, and does believe, that the person upon whose life such prior estate depends, is dead, and that his death is concealed by the party against whom the application is made. The petition must be verified by affidavit, and a copy served upon the person against whom the application is intended to be made, with at least 14 days' notice of the time and place at which the same is intended to be presented.(2) The petition and notice being duly served [ch. 2. § 14-17.] and presented on a regular motion day; if no sufficient cause be shown to the contrary, the court upon due proof of the service of such petition and notice, will make an order requiring the party against whom the application is made, to produce and show the person upon whose life such estate depends, at such time and place, and to such master of the court, or commissioner or commissioners, not exceeding two, as shall be named in such order. A certified copy of such order shall be served upon the party against whom the application is made, at least fourteen days before the day specified therein, at which any person shall be required to be produced. The master or commissioners shall attend at the time and place specified in the order, for the purpose of attending to the execution thereof, and they shall have power to take proof, by the examination of witnesses to be sworn by them, as to the identity of the person upon whose life such estate depends. Subpœnas to compel the attendance of witnesses before such master or commissioners, may be issued and served in the like manner and with the like effect, as before examiners in chancery in any cause pending in this court. If it appear satisfactorily to the master or commissioners, on due proof by affidavit, that the person required to be produced is in prison, or is kept or detained by any other, they may allow a writ of *habeas corpus* to be issued out of the court of chancery, to bring the body of such person before them; which writ shall be served and executed in the same manner as such writs to enquire into the cause of the detention of any person, and all the provisons of

§ 54. Order and service and execution of order. Subpœnas; Habeas Corpus, to produce the person, and if produced, the final proceedings; if not produced, to be deemed dead.

(1) 2 R. S. 343. § 1. (2) ib. § 2, 3.

law, in relation to obedience to such writ, shall apply to the writ so allowed by such master or commissioners. If such person shall be produced before the master or commissioners, pursuant to the order of the court, they shall state the same in their return, and shall also state therein, whether they or either of them, were personally acquainted with such person, or whether his identity was proved by witnesses examined by them, and shall set forth such proof in their return. If such person shall not be produced before them, they shall so state in their return. Upon the filing of any such return, if it shall appear that the order has been complied with, the proceedings shall be discharged, and the court shall direct an entry of such return to be made in its minutes; and shall order the costs of the proceedings to be paid by the applicant. If it shall appear, from such return, that the person upon whose life such estate depends, was not produced before the commissioners, as required by the order, and that due service of such order was made, as herein required, such person shall thereafter be taken to be dead; and the party entitled after his death, may forthwith enter upon the said lands or tenements, in the same manner as if such person were actually dead.(3)

§ 55. Proceedings if person be out of the state; notice; commission & return.

If it shall be shown to the court, by affidavit on the part of the person against whom any such application shall be made, in any stage of the proceeding, that the person upon whose life such estate depends, is or lately was at some place certain, beyond sea or elsewhere out of this state, the proceedings shall cease, unless the party prosecuting such order, shall, at his own costs and charges, obtain a commission, to be issued out of the court of chancery, and to be directed to one or more commissioners, to be appointed for that purpose by the court, residing at such place, to obtain a personal view of the person upon whose life such estate depends.

If such party shall elect so to send to such place, he shall give notice, in writing, to the party against whom the original application shall have been made, of the time, and place certain at which the commissioners will attend, for the purpose of having such view, as follows: 1. If the place be within any of the United States, or in either of the provinces of Canada, at least two months' notice shall be given: 2. If the place be within either of

(3) 2 R. S. 344-5. § 4-10.

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the West-India islands, at least three months' notice: 3. For all other places, at least four months' notice. The commissioners shall possess the same powers, and shall proceed in like manner, as above provided, and the like proceedings shall be had, and with the like effect, upon the coming in of their return. If it shall appear from such return, that the person upon whose life such estate depends, was produced before them, the application shall be discharged, with the like effect as before provided; if it shall appear that he was not so produced, he shall thereafter be taken to be dead, and the party entitled after his death, may forthwith enter upon the said lands and tenements, in the same manner as if such person were actually dead.(4)

§ 56. Party required to produce person, may show certain matters; order of court thereon.

The party against whom any such application shall be made, may show, by affidavit or otherwise, to the court of chancery, 1. That the person upon whose life such estate depends, is or was living, at the time of any return made by any commissioners appointed under the preceding provisions. 2. That such party has used his utmost endeavors to procure the person upon whose life such estate depends, to appear before such commissioners, according to the exigency of the order by which they were appointed: and 3. That he could not procure or compel such person so to appear. If such court be satisfied of the truth of such allegations, it shall cause an entry of such proof to be made in its minutes, and shall thereupon declare that there is no reason to presume the death of the person upon whose life such particular estate shall depend; and all further proceedings on such application shall cease.(5)

§ 57. Orders of court; evidence; costs; restoration of estates in certain cases; remedy for rents and profits.

A copy of any entry made in the minutes of the court, pursuant to the provisions of this title, duly certified, shall be evidence, in all courts within this state, of the facts therein stated. When provision is not herein otherwise made for the payment of the costs of the proceedings, the same shall be paid by such party as the court shall direct. Any estate which shall have been recovered upon the presumption of the death of any person, shall be restored to him who shall have been evicted, if in any subsequent action, the person presumed to be

(4) 2 R. S. 344. § 11-14. (5) ib. 345-6, § 15, 16.

dead, shall be proved to have been living, at the time of the commencement of such action. Every person so evicted, his executors or administrators, shall recover, in any action to be brought by him or them, the full profits of the estate, during the time he shall have been deprived thereof, and during the life time of the person on whose life such estate depended, against such as occupied the same, his or their executors or administrators.(6)

8. WRIT OF AD QUOD DAMNUM.

§ 58. When the writ issues in behalf of the state, or of the United States, and the proceedings thereon.

Whenever the governor of this state shall be authorised by law to take possession of any lands or tenements within this state, for the use of the people of this state, and he cannot agree with the owner or owners of such lands or tenements, for the purchase thereof, he shall cause application to be made to the court of chancery, for a writ of inquiry of damages, which shall thereupon be issued to the sheriff of the county within which such lands or tenements shall be situated, unless the chancellor shall direct such damages to be assessed by a foreign jury.(1) Whenever any lands or tenements shall be taken for the use of the people of the United States, by the consent of the legislature of this state, and it shall become necessary to issue a writ of enquiry of damages, the like proceedings will be had, as provided in the statute.(2) The mode of proceeding where lands are thus taken for public uses is prescribed by the statute. The writ must describe the lands, and direct the sheriff to inquire by a jury into the injury that may be sustained, and make return with their inquisition. Notice of executing the writ must be published in the county three weeks. The jury consisting of 12, are sworn, may view the lands, ascertain the value and assess the damages. The inquisition signed by them and the sheriff may, if partial or defective, be set aside and a new one taken; or confirmed and an order entered declaring an absolute estate in the state, (or United States) upon payment of the amount assessed. The money is paid from the

(6) ib. § 17-20.
(1) R. S. 588. § 66.
(2) ib. 590. § 76.

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(3) See 2 R. S. 588-590. see forms, &c. *post*, Vol. II. ch. v.

CHAPTER VI.

ORIGINAL BILLS.

§ 1. Preliminary proceedings before filing the bill and issuing process.

HAVING considered the preliminary theory in relation to the court, [ch. 1.] petitions and bills in general as exhibiting the leading outlines of a suit, [ch. 2.] costs; [ch. 2. § 2. 80. ch. 3. § 3.] limitation of process; [ch. 3. § 16.] parties; [ib. § 17.] pursued the preliminary steps necessary to the regular commencement of a suit by original petition or bill: *first*, for a party legally qualified to prosecute in person or by solicitor; [ib. § 1-2.] by preparing security for costs; [ib. § 3.] obtaining an order to prosecute as a poor person; [ib. § 7.] securing testimony *de bene esse*; [ib. §11.] searching for parties and documents, [§ 19.] making demand or giving notice: [ch. 2. § 80. ch. 5 § 30.] *secondly*, in behalf of a person not thus qualified: by obtaining the appointment of a next friend, [ch. 4 § 1-2, &c.] committee, [ib. 1, 8. &c.] or guardian; [ib. § 27. ch. 5. § 30.] the measures now to be recommended previously to the actual filing of a bill and issuing process thereon, will be, 1. To draw the heads or minutes (1) of a decree such as the party complainant is desirous of obtaining; 2. To settle with counsel the appropriate remedy and form of bill applicable to such decree. 3. To prepare, with all the accompanying papers to be filed, notices to be served, process to be sealed, and deposits to be made:

THE BILL.

§ 2. Bills and the general foundation of remedies.

So much of the general foundation of remedies by bill as is compatible with the practical design of the present treatise will appear from the following analysis, (2) and subjoined illustrations in connexion with a few original bills considered separately.

(1) See Vol. II. form of minutes.

(2) This analysis is made principally in conformity with the arrangement of Willis' Pleadings in equity upon the plan of Lord Redesdales treatise.

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BILLS ARE : I. ORIGINAL.
II. NOT ORIGINAL.
III. IN THE NATURE OF ORIGINAL.

I. Original are ;
- 1. for relief;
- 2. not for relief.

II. Bills not original are,
1. Supplemental bills.
   - 1. Before hearing.
   - 2. In aid of a decree, or to bring up all things necessary to a decree.
2. Bill of revivor.
3. Bill of revivor and supplement. Bill of supplement in nature of a revivor.(3)

III. Bills in nature of original bills :
1. Cross Bill; 2. Bill of review; 3. Bill of review and supplement and revivor; 4. Bill in nature of a bill of review when the party is bound to the decree; 5. Supplemental bill in the nature of review; 6. Bill in nature of review when the decree has been made against a person who has not such an interest in the matter as to render the decree against him binding upon a person claiming a simular interest; 7. Bill to set aside a decree obtained by fraud; 8. To suspend the operation of a decree; 9. To carry a decree into execution; 10. Bill in nature of a bill of revivor; 11. Bill in nature of a supplemental bill.

The first division of bills is all that appertains to the present stage of the practice. Bills not original, and those in the nature of original, will be mentioned in the several stages of the proceedings in which they necessarily arise in the ordinary course of practice.

(3) See Eq. Draft. 346.

ORIGINAL BILLS: CHAP. VI.

I. PRAYING RELIEF, or a decree touching some right claimed by the plaintiff in opposition to the defendant are:(3)

1. Where the principles of law, by which the ordinary courts are guided give a right: but the powers of those courts are not sufficient to afford a complete remedy;

1. Where no remedy, or no complete remedy;(4) Where the remedy is insufficient(5) doubtful(6) and difficult;(7)

2. Where the remedy attempted has failed, or been defeated by fraud or accident.(8)

Under this head are bills for relief, where an instrument on which a title is founded is lost, obtained by fraud, destroyed or fraudulently suppressed; to restrain waste; or in aid of courts of common law, to carry a statute(9) into execution; to remedy a defective deed; to obtain relief where by the confusion of boundaries the remedy at law has been defeated; to obtain deeds; compel specific performance; for an account; foreclosure; partition; dower; divorce.

2. Where the courts of ordinary jurisdiction are made instruments of injustice: Relief will be granted on the ground of fraud, mistake or accident.—To scrutinise fraud by a discovery and set aside fraudulent conveyances, so as to quiet title is the province of equity which destroys the evidence of the corrupt title by perpetual injunction, so that the

(3) see select forms, and references to forms, *post* vol. 2. ch. 6.
(4) Willis 13-117.
(5) 20 J. 563. 484-5. 1 Paige 97. 99.
(6) 17 J. 384. 10 J. 587. 2 C. C. in E. 1. 4 J. Ch. 287.
(7) 1 Paige 90. 92.
(8) 17 J. 384. 14 J. 63. 4 J. Ch. 687. 682. 671. 4 J. Ch. 566. 682. 687. 690. and 671. as explained in 20 J. 566. 5 J. Ch. 280. affirmed in 20 J. 554. and the power of reaching debtors' property also since declared by 2 R. S. 173-4. see Willis 45. 115.
(9) On the equity of a statute, see 4 J. Ch. 601-2. 19 J. 380. 1 Hopk. 10. vid. 1 J. Dig. 378, &c.

title cannot (as it may at law after one trial in ejectment,) be revived.(11) To restrain proceedings at law, and for the delivery and cancellation of an instrument; for re-conveyance of property, to rectify *mistakes*(12) and restrain, &c. for relief against the consequences of an *accident*(13) as lapse of time, in a court of law; for redemption; to prevent the unfair use of an advantage in proceeding in a court of ordinary jurisdiction gained by fraud or accident, or where an undue advantage has been taken to obtain an unwarrantable contract(14) as usurious security(15) and for relief on the ground of general policy.

3. For relief in matters of trust.

4. For removing impediments to the fair decision of a question.

5. To preserve property in dispute pending a litigation; for payment of creditors, and marshalling assets.

6. To prevent the assertion of a doubtful right in a manner productive of irreparable injury; as to restrain *trespass* destructive of inheritance,(16) infringement of a copy right, of a patent, restrain waste where the common law has no remedy: on ground of preventive policy(17).

(11) 18 J. 541-2.
(12) Mistake, see 17 J. 353. 373. 376. 383. 375. arg 2 J. Ch. 585. 7 J. 557. 1 J. Ch. 607. 5 J. Ch. 262. 224. 4 J. Ch. 85. 18 J. 544. As to *mistake or ignorance of law*, see 8 Wheat. 211. 174. sed. vid. 1 Wendell's Rep. 6 J. Ch. 166. 2 J. Ch. 51. 60. 1 J. Ch. 516.
(13) Accident, see 4 J. 510. 17 J. 383.
(14) Unconscientious advantage or hard bargain, vid. 14 J. 501. 18 J. 534. 1 Fonbl. Eq. B. 1. c. 4. § 6. as to hardship, see 5 J. Ch. 518. 4 J. Ch. 310. 118. 14 J. 527.
(15) On payment of principal and legal interests by *decisions* (15 J. 555. vid. 5 J. Ch. 122. 555. 2 J. Ch. 188. reversed by 15 J. 555. but not on that point.) But *the statute* has varied the rule. see 1 R.S. 772.
(16) 1 Paige 97. 99. 1 J. Ch. 318. 501. 7 J. Ch. 315. 6 J. Ch. 497.
(17) vid. 4 J. Ch. 562 5.

7. To put a bound to vexatious and excessive litigation;(18) to restrain suits commenced, or the commencement of suits;(19) prevent the erection of a nuisance where irreparable injury would ensue to an individual; to establish a legal right against several distinct persons, and to quiet enjoyment and for relief *quia timet.*

8. To prevent injury to a third person by the doubtful title of others: by bill of interpleader.

9. Bills for relief not entirely included under the foregoing classes:—in the nature of injunction, or for injunction, or ne exeat republica, discovery and relief, &c. to compel a suit in favour of surety, &c.(20)

II. ORIGINAL BILLS, NOT PRAYING RELIEF

1. To perpetuate testimony,

2. For discovery only.

GENERAL REQUISITES.

§ 3. Formal division of a bill for relief.

The formal divisions of a bill for relief are, 1. The direction or *address:* 'To the Chancellor of the State of New-York'; or if the chancellor be a party, 'To the Vice-Chancellor of ——— Circuit.' [see ch. 2. § 5.] 2. *The introduction,* 'Complaining sheweth, &c.' 'Your orator, &c.' 'of &c.' containing the name, description or additition and place of residence of the complainant. 3. The *case* or *stating part;* 'That your orator, &c.' containing the complainant's case setting forth nothing but what is pertinent. If impertinent or scandalous matter be introduced, the bill may be excepted to. [ante ch. 2. § 5. post ch. 8.] 4. The *allegation of confederacy.*

(18) To prevent a multiplicity of suits and quiet title, 1 J. Ch. 166. 4 J. Ch. 241. 262. 3 J. 566. vid. 2 J. Ch. 281. 2 C. C. in E. 344. 1 J. Cas. 429. see ante ch. 2. § 17.

(19) 6 J. 523. 5 J. Ch. 174. 4 J. Ch. 85.

(20) See 17 J. 384. 5 J. Ch. 305. 4 J. Ch. 123. 2 J. Ch. 554. 15 J. 436. n. Holt N. P. 84. 1 Gallis' R. 32. 13 J. 174. much doubted in 2 J. Ch. 563. 7 J. 332. 6. 13 J. 383. 15. J. 433-4.

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'But now so it is, &c.;' containing the general charge of confederacy, which in amicable suits, and perhaps in others might be omitted. 5. The *charging part*, containing the pretences and charges. The pretence embraces what the defendant might be supposed to set up, and the charge is made to avoid such matter. The charging part might be adopted to obtain a discovery of the nature of the defendant's case, or put in issue some matter which it is not for the interest of the complainant to admit; for which purpose the charge of pretence of the defendant is held sufficient.(4) But there can be no allowance in taxation for repetition of statements in the charging or interrogating part, or any unnecessary or improper matter;[ante ch. 2. § 81.] 6. The *jurisdiction clause*, giving cognizance: 'In tender consideration'; &c. 7. The *interrogating part*.(5) 'To the end therefore'; &c. 8. The *prayer of relief*.(6) 'And that your orator may'; &c. 9. The *conclusion*,(7) praying process against the parties(8) of *injunction*, *ne exeat*, as the case may require, and *subpœna*: 'May it please', &c.

§ 4. General requisites; statements; averments; jurat and what bills must be verified by oath or supported by affidavits.

Bills and petitions contain the same address, mode of averring and setting forth facts, or deeds(9) the same verification, [*jurat* ch, 2. § 8.] and general requisites as directed. [ante ch. 2. § 5-9.] The bill must contain ground for equitable relief, which when fully stated and correctly applied will warrant a decree (10) between parties and in relation to matters which can be properly joined in the same bill. [see ante ch. 3. § 17.] In suits against heirs liable to any creditor in consequence of lands descended [who must be prosecuted jointly in a court of equity only] the bill so charging them on account of lands descended, must specify with convenient certainty the land descended.(11) Any bill seeking to transfer to a

(4) See Eq. Draft. 4. 5. 16. 18 to 50. see Mitford Pl. 43.

(5) Eq. Dr. 6. 7. see inquiries Eq. Dr. 16-59. Interrogatores 474-571. which may be usefully referred to in framing this part of the bill. As the answer on oath cannot be insisted on in bills against corporations, individual officers may be thus called upon if made parties.(1 Paige 220.) The complainant may now waive an answer on oath [post § 5.] see 1 J. Ch. 65.

(6) Eq. Draft. 60. 61. 8-65, as to specific relief prayed. see 1 J. Ch. 111. 14 J. 527. 1 J. 529.

(7) Eq. Draft 8. 6. 57. 64-6.

(8) A person not included in the prayer for process or in a distinct allegation [1 Hopk 555.] is not a party. [2 J. Ch. 242.]

(9) Not in hæc verba, &c. 4 J. Ch. 437. ante ch. 2. § 5. 81.

(10) 1 J. Ch. 184.

(11) 2 R. S. 454.

court of chancery, matter properly cognizable in a court of common law, must be verified by affidavit. Thus a bill seeking to have a title established and possession quieted.(12) A bill to perpetuate testimony of witnesses aged or residing abroad must be accompanied by an affidavit, stating generally the age infirmity and residence.(13) A bill for discovery merely requires no affidavit.(14) But if relief is prayed as well as discovery an affidavit of the loss(15) of the instrument as a deed, note, or bond(16) and as to plaintiffs non possession of them must be annexed to the bill.(17) An affidavit to a bill for discovery and injunction, by one of several plaintiffs, stating that he had been informed and verily believed, and hoped to prove that the deeds in question did exist and were lost or destroyed in the manner mentioned in the bill, was deemed sufficient.(18)

To a bill of interpleader an affidavit by plaintiff must be annexed, that it is not collusive; against which a counter affidavit will not be allowed by the court.(19) A bill for injunction or ne exeat must be verified, and the application for these writs as well as for appointment of receiver sustained by affidavit as hereafter directed. A bill for partition must be sworn to.(20) [ante ch. 5. § 31.] All bills declaring void the marriage contract; to obtain a decree for a separation or limited divorce, and for the purpose of obtaining a divorce on the ground of adultery, whether the husband or wife is complainant, must be duly verified by oath, in the usual manner of verifying bills where by the course and practice of the court an oath is required.(21) When a bill is filed other than for *discovery only*, the complainant may waive the necessity of an answer on oath, and then the answer may be without oath, and will have no other or greater force as evidence than the bill.(22) But the waiver must be distinctly stated in the bill.(23) Bills for divorce, dissolving the marriage contract, cannot call on defendant to answer on oath or affirmation; the defendant in all such cases being allowed to answer without.(24)

§ 5. An answer without oath, may, be received.

(12) 6 J. Ch. 342. 346. 2 C. C. in error. 344. 1 J. cas. 429.
(13) 2 C. C. in eror, 344. 1 J. cas. 429. See 1 Sim, and Stu. 83. Harr. 52. Wy. Prac. Reg. 70.
(14) 1 J. cas. 429. 2 C. C in Er. 344.
(15) 4 J. Ch. 294.
(16) Ves. 342.
(17) 2 P. Wms. 540-541. 3 Atk. 7. 132. See forms Bla. 35-36. apx.
(18) 1 J. Cas. 417. 2 C. C. in Er. 175.
(19) 2 Ves jr. 110.
(20) R. 174.
(21) R. 163.
(22) 2 R. S. 175. § 44.
(23) R. 40.
(24) 2 R. S. 144. § 39.

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§ 6. Drawing engrossing, signing, indorsing.

The bill is drawn, engrossed, signed and endorsed as before directed. [ch. 2. § 6, 9.] In England the bill except its formal parts is drawn, settled and when engrossed, signed by counsel. Here, though it must be signed by counsel and though the fee bill presupposes that it is at least perused and amended [ante ch. 2. § 81.] yet this is not always the practice. The signature of counsel is very much a matter of course and is given without exacting any fee from the solicitor. There may be occasions when a counsel thus signing a bill without examining it, might subject himself to costs as when the bill contains matter objectionable on the ground of scandal &c. If the bill be filed without signature of counsel [see ante ch. 1. § 18. ch. 2. § 9.] it is liable to be taken off the file on application of defendant with costs,(25) demurred to, (26) and dismissed, the defendant not being bound to answer it until signed.(27)

§ 7. Peculiarities of practice in particular suits before bill filed.

The proceedings before the filing of the bill may be further considered in reference to the peculiarities of a few particular suits, in the following order of arrangement: 1. *Foreclosure:* 2. *Redemption:* 3. *Discovery:* 4. *Interpleader:* 5. *Divorce:* 6. *Account:* 7. *Injunction* and *Ne exeat.* The preparatory process, notice, bonds, deposits, &c. will close the present chapter.

1. FORECLOSURE.

§ 8. Foreclosure or sale.

A bill to foreclose the equity and one for a sale, are not synonymous in purport or effect. The former simply bars the equity of redemption,(1) though the usual time to redeem in this case is generally extended from six months to six, or from three to three under the circumstances. A mortgage to the state may be foreclosed by notice in the manner mortgagees may sell under a power of sale; or if the attorney general judge proper, he may foreclose the equity in chancery.(2) In all cases the advantages of foreclosing in chancery are these: 1. The proceedings are *in rem*, possession follows decree, and will be enforced without a resort to ejectment;(3) chancery being vested with full power to decree

(25) 1 Sim. and Stu. 135. 5 Ves. 547. 550. 1 Crant 33-4.
(26) 5 Madd. 278.
(27) Cary 117. 127. 160. 1 Dick. 68.
(1) 4 J. Ch. 140. vid. 18 J. 561.
(2) 1 R. S. 211-212. 2 ib. 547. See 1 J. Dig. 304-5.
(3) 4 J. Ch. 609.

a sale, enforce possession to purchaser, and if a balance still be due from mortgagor, to issue an execution for the same.(4) 2. The assignment of the debt, which is the principal, carries the mortgage which is the incident in equity.(5) 3. If the bond or other security be from a third person, he may be made party to the foreclosure, and if a balance still remain due after sale of the premises, execution may go against the obligors so made parties.(6) 4. After bill filed no suit can be had at law to recover the debt secured by the mortgage, without authority from chancery.(7) 5. Though before decree for sale, the money and costs may be brought into court, where the bill is for one instalment, and others will fall due; yet after such decree the proceedings cannot be stayed, but the court may enter decree to cover any future default.(8) But no bill can be filed if there has been a suit at law and judgment, until nulla bona be returned as to any property except the mortgaged premises.(9) If the creditor has a mortgage on two funds, and another creditor a mortgage on one of them, the former must exhaust the fund not encumbered by the second,(10) and the debt must be due though the mortgage premises are in decay.(11)

§ 9. Parties.

Beside the parties just mentioned [see as to parties, ch. 3. § 17.] the general rule is that all persons interested in the premises must be made parties, whether prior or subsequent incumbrancers, excepting those pending the suit.(12) If there be an absolute assignment, the mortgagee need not be a party.(13) But a mortgagor whose equity has been sold under an execution at law, must be a party, as he has by statute one year after the sale to redeem.(14) Where legacies were made a charge on a mortgaged estate, the legatees as well as the devisees under their father's will, who derived title not to the whole, were to be made parties.(15)

(4) See 2 R. S. 191.
(5) 3 J. Cas. 322. 1 J. 550. 4 J. 41. 3 J. Ch. 229.
(6) 2 R. S. 191. § 154.
(7) ib. § 153.
(8) 2 R. S. 192-3. § 161-3. see 4 J. Ch. 534. 536. 1 Hopk. 119. 120. 7 J. Ch. 13.
(9) 2 R. S. 192. § 156.
(10) 1 Hopk. 460. vid. 1 J. Dig. 382.
(11) 4 J. Ch. 538.
(12) See 4 J. Ch 605. 116. 649. 3 J. Cas. 322. 311. 3 J. Ch. 459. 5 J. Ch. 35.
(13) 7 J. Ch. 144.
(14) 4 J. Ch. 649.
(15) 6 J. Ch. 450.

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§ 10. Obtaining release, or preparing notice of the nature and object of the suit to be served on incumbrancers.

It was formerly the practice to tender a release to be executed by subsequent incumbrancers, else if they appeared and disclaimed they would recover costs.(16) But now in any such suit the complainant may deliver to any defendant at the time of serving the subpœna, a written or printed notice, subscribed by the complainant or his solicitor, stating that the suit is instituted to foreclose a mortgage and giving a brief description of the mortgaged premises, the sum for which the mortgage was executed, the date of the mortgage, and if registered, the time of the registry, and that the complainant makes no personal claim against such defendant. If a defendant on whom such a notice has been served appears and disclaims, he shall not recover costs, but shall pay costs to the complainant; and if the complainant neglect to serve such notice, by reason whereof a defendant is put to unnecessary costs in employing a solicitor to defend the suit, such costs may be charged personally on complainant in the discretion of the court.(17)

§ 11. Foreclosure; bill; what it must especially contain or exclude.

The preceding notice as well as the notice of the *lis pendens* to be filed in the clerks office as hereafter mentioned must be prepared together with: *The bill*,(1) in addition to the general requisites [ante § 1. 3. & ch. 2. § 5-9.] must, in the present case, state whether there is any suit at law for the same debt, and whether collected or any part,(2) for it has appeared, that until nulla bona in such suit be returned to all, excepting the mortgaged premises, no proceedings can be sustained in chancery.(3) In a bill for the foreclosure or satisfaction of a mortgage it shall not be necessary or allowable to set out at length the rights and interest of the several defendants who are purchasers of, or who have liens on the equity of redemption in the mortgaged premises, subsequent to the registry or recording of the complainants' mortgage, and who claim no right in opposition thereto, but it shall be sufficient for the complainant, after setting out his own right and interest in the premises to state generally that such defendants have or claim some interest in the premises as subsequent purchasers

(16) Bla. 58. 59. n. form of release ib. 108. appx.
(17) R. 133.
(1) Bla. 59. form to be modified. vid. also Willis 94. Eq. Draft. 166. 179. 200. 171. 159. 161. 56. 167.
(2) 2 R. S. 191. § 155.
(3) ib. § 156.

or incumbrancers or otherwise, and if any such defendants are by the misstatement of the complainant in his bill, or otherwise unnecessarily compelled to put in an answer to protect their rights, the costs occasioned thereby may in the discretion of the court be charged on the complainant personally; and if such defendants unnecessarily put in an answer to such bill, the extra costs occasioned by such answer may be charged on the defendants personally in the discretion of the court.(4)

2. BILL TO REDEEM.

§ 12. Bill to redeem personal or real; within what time. Twenty years is allowed to redeem.

This may be for redemption of personal chattels, chattel real, or real estate. It may be brought to redeem personal property pledged,(5) or mortgaged.(6) At law the interest of the mortgagee of personal, becomes absolute on the non-payment of the money or non-performance of the condition at the day.(7) The redemption of real estate, &c. mortgaged, extends to an absolute conveyance proved by parol to have been intended as a mortgage,(8) or an absolute purchase under execution by an attorney construed to be in trust,(9) or a trust term,(10) or term for years: and where a mortgagee obtains a renewal of the lease, or any other advantage in consequence of his situation as mortgagee, the mortgagor redeeming will be entitled to the benefit thereof, and chancery would regard with jealousy, any contract made with,(11) or by(12) mortgagor to impair or embarrass the right of redemption. Twenty years is allowed to redeem. Quiet possession by mortgagee so long, and not less, will bar redemption,(13) but no time is a bar where there is fraud sed vide ante ch. 3. § 16.] in the transaction, or where by the agreement, mortgagee is to keep possession until paid out of the profits.(14) Where a bill is filed to foreclose merely, in which case the decree bars the equity of redemption only, the time allowed to redeem may be enlarged from six months to six, or from three to three upon equitable terms, but this does not apply to cases

(4) R. 132.
(5) See 2 J. Ch. 62. 2 C. C. in. E. 200.
(6) See Eq. Draft, 185.
(7) 7 Cowen 290.
(8) 4 J. Ch. 167. see 1 Paige, 48.
(9) 4 J. Ch. 118
(10) See Eq. Draft, 161.
(11) 1 Paige 48-9 2 J. Ch. 30.
(12) See 7 J. Ch. 25.
(13) 1 J. Ch. 385.
(14) 1 J. Ch. 594.

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of a decree for the sale according to the usual practice.(15)

§ 13. Preliminary steps.

It might be advisable to offer payment of the amount before bill filed;(16) a tender of the amount due should be made in order to stop interest: but as to costs [ch. 2. § 80.] the general rule is that the party seeking to redeem must pay costs although he is successful. There are however exceptions, as where the mortgagee sets up an unconscientious defence; here he is not only refused costs but must pay costs to the other party.(17) The parties [ch. 3. § 17.] are the mortgagor or any person entitled

Parties.

tot he estate of the mortgagor, or claiming a subsisting interest under it;(1) against the mortgagee and purchasers under him.(2) An incumbrancer pending a suit for foreclosure is not entitled to redeem unless in special circumstances.(3) But a subsequent judgment or mortgage creditor may offer and has a right to redeem a prior mortgage.(4) A bill for *relief* is not a bill to redeem.(6) It is essential to the bill,(5) *to redeem* that the complainant should offer to pay the debt interest and costs.(7) It usually states a prior tender of the money and a refusal.(8) It has been decided that a party could not obtain *relief* against a mortgage given to secure a *usurious* debt without offering to redeem by paying the principal and legal interest.(9) But by the revised statutes,(10) no offer to pay any interest on a usurious loan is necessary on a bill filed for discovery, nor can the court require payment or deposit of the principal or any part, as a condition of *relief* in *any case* of a usurious loan.

§ 14. Bill. Offer or tender of amount due on bill to redeem, but not on bill for relief against usury.

(15) 4 J. Ch. 140.
(16) See 18 J. 544. 560. 15. J. 555.
(17) 1 Paige, 48-9.
(1) 9 J. 591.
(2) 3 J. Cas. 311.
(3) 5 J, Ch. 35.
(4) ib.
(5) Bill. See. Bla. 66. Willis, 160. 381. Eq. Draft. 158. 173. 182. 161. 176. 167. 45. 185.
(6) 18 J. 544.
(7) 18 J. 544. in error on reversal of Beekman v. Frost. S. C. 1 J. Ch. 288. 304. 18 J. 570.
(8) Spencer Ch. J. 18 J. 560. in Error,
(9) 15 J. 555.
(10) 1 R. S. 772. § 5. 8.

3. DISCOVERY.

§ 15. Discovery *only*, and discovery and relief.

Discovery only, and discovery and relief.

Every bill is in effect a bill of discovery. But the bill strictly for discovery and not for relief also, is for discovery of facts within defendant's knowledge, or deeds, papers, lost or not, or things within his knowledge, custody or power, which cannot be reached at law, and are material to a prosecution or defence.(5) For equity is ancillary to law in compelling before trial--not after(6)—a discovery of facts excepting such as would implicate the party's character, or subject him to a penalty,(7) and generally in aid of some court or jurisdiction not empowered to compel a discovery on oath,(8) as that of a surrogate, or of courts of common law.(9) It also lies against *third persons* to discover money paid after notice of sequestration; for concealment of bankrupts' estate, for goods in part saved, on board of a ship,(10) or property of a judgment debtor as a residuary trust interest in chattels,(11) or choses;(12) in which cases on a bill for discovery and relief, the court of errors has recognized the broad principle that chancery will aid the judgment creditor where his execution failed at law to discover and reach the debtor's property in whose hands, or in what intangible shape soever it may be. The same power in the court has been since declared by the revised statutes,(13) and hence, on return of nulla bona, defendant or others may be compelled to discover, and restrained from transferring property, money or thing in action, due or held in trust, except the trust or fund proceed from some other than defendant, and compel payment of the judgment at law, whether the thing discovered or in trust was, or not, liable to execution.(14) A bill of discovery may also be filed, and defendant compelled

(5) vid. 4 J. Ch. 294. 409. Bla. 24. 34-36. and authorities. 1 Grant 20. Fonb. Eq. 2. 482, &c.
(6) 4 J. Ch. 566. 3 ib. 351.
(7) See 16 J. 592. reversing 3 J. Ch. 45-7. 4 J. 510. 18 J. 533. 14 J. 63. 1 J. Ch. 91.
(8) ib.
(9) Surrogates 4 J. Ch. 409. But the supreme court is now vested with chancery powers to compel a party to a suit pending to produce and discover books, papers and documents relating to the merits. 2 R. S. 199-200.
(10) 1 Madd. 166-7. 170.
(11) 4 J. Ch. 687.
(12) 5 J. Ch. 280. affirmed in error. 20 J. 554. Hadden v. Spader.
(13) See 2 R. S. 173-4. § 38, 39.
(14) R. S. ib.

CHAP. VI. to answer on oath where he has given a collusive bond and warrant of attorney, on which judgment is entered to defraud creditors, or place the property beyond reach, when, in fact, nothing, or a less sum than expressed, was due.(15) Every person liable to be sued by any loser or other person sustaining the loss, (as where an agent thus squanders the money of his principal) by virtue of the statute against unlawful betting on races or games, or in gaming, may in like manner be compelled to discover the money or property won, and compelled by decree to return the same; in which case no person except the parties, will be excused from testifying; but their answer or testimony cannot be used against them in any other respect.(16) Every person liable to be sued for taking more than legal brokage as fixed by statute may in like manner be compelled to discover and return the money, property or chose in action, so illegally received.(17) Every person offending against the provisions of the statute in relation to the interest of money may also be compelled to answer on oath, any bill for a like discovery of money, goods or choses taken by way of illegal interest.(18) And the borrower on filing his bill for the discovery need not pay or offer to pay any interest, nor can the court require the payment or deposit of the principal as a condition of relief against the usurious loan.(19)

§ 16.
The bill. The bill (beside its usual requisites, ante § 3, 4. ch. 2. § 5, &c.) ought to state enough to enable the court to see that the ends of justice require its interposition; and the facts sought to be discovered should be so far stated as to show their pertineney and relevancy.(20) If for matters material to a defence at law, the nature of the defence must be so stated.(21) A bill for discovery in aid of a cause before a surrogate brought for an account and distribution of the intestate's estate, must charge certain facts within the knowledge of the defendant, the disclosure of which is material and necessary to the party's defence in that court, and that he has no means of showing the facts without such discovery.(22) If the bill

(15) See 2 R. S. 174. § 41, 42.
(16) See 1 R. S. 663. § 16-21. vid. 7 Cowen 496.
(17) 1 R. S. 709.
(18) 1 R. S. 772. § 5-7.
(19) ib. § 8.
(20) 16 J. 592. 3 J. Ch. 45.
(21) ib.
(22) 4 J. Ch. 409.

seek discovery in aid of the jurisdiction of a court of law, it must appear that such aid is necessary, and the discovery material to the defence; for if the facts depend on the testimony of witnesses whose attendance the court of law may compel, chancery will not interfere.(23) It seems that chancery will not sustain a bill for discovery and injunction merely to enable the party to procure such admissions by the adverse party as might be used in mitigation of damages in an action of trespass.(24) But it seems that where the bill is for discovery merely, and no injunction asked for, the court will not, where there is a demurrer to the bill, examine so nicely as to the materiality of the discovery;(25) and on a general demurrer to the whole, a bill for discovery and relief may be good as to the discovery.(26) But a mere *fishing* bill will not be sustained, as where executors stated that they had been sued for a pretended debt of testator of which they had no knowledge, and had strong ground to believe unjust, that they could not safely go to trial without discovery, and praying an injunction and discovery;(27) nor will a discovery lie to compel a purchaser for valuable consideration without notice of plaintiff's title to make discovery, or an attorney to disclose professional communications, nor a party to implicate himself.(28) The bill(29) if for discovery and relief requires an affidavit, [§ 4.] and may also, it seems, in that case, waive an answer on oath. It has been said that the statute of limitations is not a bar to discovery, though the note, &c. had been gone more than 6 years.(30) But the revised statutes have adopted a new rule of limitation. [see ante ch. 3. § 16.]

§ 17. Affidavit; waiver of oath.

(23) 1 J. Ch. 543.
(24) ib.
(25) 4 J. Ch. 409.
(26) 4 J. Ch. 294. vid. 5 J. Ch. 184. 18 J. 533.
(27) 2 J. Cas. 413. 2 C. C. in error. 296.
(28) 1 Madd. 173.
(29) Forms for discovery or discovery and relief. Willis 316. 326. Eq. Draft. 321-6. 211. 220. 288. 18. 38-40. 46. 16. 22. 50, &c. 54.—2 C. C. in error. 296. 175. 1 ib. iii. 1 J. Cas. 417. 2 ib. 413. Bla. 24. 34-5. Hoff. 268-9, &c.
(30) vid. Bla. 34. 8 Vin. 438. Bunb. R. 60. (Bunb. is not good authority) c. 1 Grant 20.

4. INTERPLEADER.

§ 18. Bill of interpleader; peculiarities of practice before bill filed.

A bill of interpleader is exhibited to compel two or more persons claiming the same duty or property by different titles or separate interests, to interplead, so that the court may adjudge to whom the thing belongs, and the complainant be indemnified. The bill states his rights and their claims, and prays that they may interplead accordingly. The bill may be filed by tenants, stakeholders, factors and agents against opposite claimants.(1) An auctioneer is the agent as well of the purchaser as of the vendor of an estate; and if the vendor commence an action against him for the recovery of the deposit, he may file a bill of interpleader, for the purpose of ascertaining to whom it belongs.(2) An affidavit(3) is annexed to the *bill*(4) that complainant does not bring it by consent or collusion with defendant. The bill is on a footing of injunction to stay waste, and may be supported by affidavit of material facts on application for injunction.(5) [see *post* § 23.] If suits at law have been brought, an injunction to restrain proceedings may be prayed for. The money claimed must be ready to be brought into court, and if an injunction be prayed, it is said, the money must be in court.(6) The statute now requires security or deposit to be made[see *post* § 26.] as a condition to the stay of proceedings at law. In ordinary cases the plaintiff offers by the bill to bring the money or other things into court, or the court will order it on application of defendants.(7) It has been recently ruled in England, that the plaintiff in an interpleading suit might move for liberty to pay the money, the subject of dispute between the defendants, into court, and for an injunction to restrain the defendants from suing him at law respecting it, without supporting his motion by an affidavit of

(1) As to interpleader, see 1 Hopk. 272. 224. 20 J. 570. 1 Cowen 691. 6 J. Ch. 445. Eq. Draft 296.
(2) Daniell's R. 64.
(3) Affidavit see Blake. 35. appx. 2 Ves. jr. 110.
(4) Bill form Bla. 32. Eq. Draft. 296-309. Willis 303.
(5) 2 Ves. jr. 101. c. 1 Grant 19.
(6) See Bla. 32. 399. and 1 Hopk. 272.
(7) 1 Grant 18. Qu? if necessary before the court will countenance the suit? ib. but see 3 Bro. C. C. 36. as to its being in time on showing cause against dissolving the injunction prayed by the bill. Grant 18.

facts,(8) and that on paying the money in, a special injunction might be moved for at once, without first obtaining a common injunction.(9) [But see *post* § 23.] CHAP. VI.

5. DIVORCE.

§ 19. Bill and parties. 1. Divorce on ground of nullity or to avoid a contract illegally solemnized.

1. Bills for divorce on the ground of the nullity of the marriage contract—1. to annul a marriage on the ground of one of the parties being under the age of legal consent, may be brought by the parent or guardian entitled to the custody of the minor or by next friend. 2. On the ground that the former husband or wife of one of the parties was living, and that the former marriage was then in force, on application of either party; 3. on the ground of idiocy or lunacy on application of any relative interested to avoid the marriage, or if not prosecuted by a relative, then during the life time of both the parties, on application of any person admitted to prosecute as the next friend of the idiot or lunatic; or by the lunatic after the restoration of reason; the term lunatic comprehending every person of unsound mind; 4. that the consent of one of the parties was obtained by force or fraud, if no voluntary cohabitation as husband and wife before suit, is made to appear, the marriage may be annulled on application of the party whose consent was so obtained, or the parent or guardian, or some relative interested to contest the validity of the marriage; 5. that one of the parties was physically incapable of entering into the marriage state, the suit must be brought by the injured party.(1) A bill to avoid a marriage irregularly solemnized and not consummated, may be brought by either party, or the parent, guardian, or next friend of either party, who may be a minor.(2) The preliminary proceedings for the appointment of next friend have been mentioned.[ch. 4. § 1-7.] The bill must be exhibited, if in name of the wife, by a next friend who must be a responsible person able to pay costs.[ch. 4. § 7. see ch. 3. § 3.] These suits must be by bill sworn to [ante § 4.] and conducted as other suits are, and the court has power to award issues, decree costs, and enforce decrees as in other

(8) 1 Simons 385.
(9) ib. 15.
(1) See 2 R. S. 142-144. 138-9. see 1 Hopk.
(2) See ib. 143. § 34. ib. 138-141.

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cases.(3) But no issue in the fifth case can be tried by jury.(4) The limitation of time for bringing the above bills is prescribed by the statute.(5)

§ 20. Bill for divorce for adultery.

2. Bills for divorce may be brought to dissolve the marriage contract on the ground of *adultery committed by the husband or wife;* 1. where *both* were *inhabitants of the state, at the time* of the commission of the *offence;* 2. where the *marriage* has been solemnized, or has taken place *within this state, and* the *injured party at the time* of the commission *of the offence, and* at the time *of exhibiting the bill,* shall be an *actual inhabitant* of this state; 3. where the *offence has been committed in this state,* and the *injured party, at the time of exhibiting the bill,* is *an actual inhabitant* of the state(6) If the wife at the time of exhibiting a bill reside in this state, she shall be deemed an inhabitant, although her husband reside elsewhere.(7) But though the adultery be established, a decree may be denied in the cases enumerated in the statute,(8) of procurement, or connivance of complainant, forgiveness proved by express proof, or by voluntary cohabitation with knowledge of the fact, the lapse of five years after discovery of the offence, or where it shall be proved that the complainant has also been guilty of adultery. The bill which must be sworn to,[ante §] may be exhibited by the wife in her own name as well as by a husband.[ch. 4. § 7.] If a bill be filed by him for a divorce, and if he wishes to question the legitimacy of any of the children of his wife, the allegation that they are, or that he believes them to be illegitimate, must be distinctly stated in the bill.(9)

§ 21. Bill for separation or limited divorce; cases & causes for the divorce; the bill, &c.

A separation from bed and board forever, or for a limited time, may be decreed, on the complaint of a married woman, in the following cases: 1. between any husband and wife, *inhabitants* of this state; 2. where the marriage shall have been *solemnized,* or shall have taken place, *within this state,* and the *wife* shall be an *actual resident at the time of exhibiting her complaint;* 3. where the *marriage* shall have taken place *out of the state;* and the *parties* have *become* and remained *inhabitants* of this

(3) ib. 144.
(4) ib. 175. § 45.
(5) ib. 142, &c. see ante ch. 3. § 16.
(6) 2 R. S. 144. § 38. see the former law. 2 R. L. 197. and 1 J. Ch. 399. 110. 108. 438. 1 J. 424.
(7) 2 R. S. 147. § 57.
(8) ib. 145. § 42.
(9) R. 160. see 2 R. S. 145. ante c. 2. § 55.

state, at least, one year, and the *wife* shall be an *actual resident* at the *time of exhibiting her complaint.* Such separations may be decreed for the following causes: 1. The cruel and inhuman treatment by the husband of his wife; 2. such conduct on his part towards her, as may render it unsafe and improper for her to cohabit with him; 3. the abandonment of the wife by the husband, and his refusal or neglect to provide for her. But her ill conduct, if proved to the satisfaction of the court, will be a defence.(10) The wife will be deemed an inhabitant, though her husband reside elsewhere if she reside in the state at the time of exhibiting her bill.(11) The bill must be exhibited in her name by a person as next friend who is responsible for, and of ability to pay costs; [ch. 4. § 7.] must specify, particularly the nature and circumstances of the complaint on which she relies, set forth times and places with reasonable certainty(12) and be sworn to.(13)

6. ACCOUNT.

§ 22. Account.

The action of account at law in all matters of account, has long been a concurrent, but neglected remedy; and although the original ground on which this court assumed jurisdiction, was that the remedy at law was doubtful or insufficient, yet by the regulations of the statute in the former case,(1) and from the powers given to surrogates in compelling executors, administrators(2) and general guardians to account;(3) proceeding by bill in those cases is not rendered necessary by any doubts or insufficiency of the remedy in other courts (4) An original bill to account lies in a variety of cases, against executors, administrators, guardians and other trustees, heirs, devisees, agents, partners and others, and is a mode of relief often coupled with a prayer for discovery, for receiver, injunction or ne exeat. A creditor's bill or suit so termed, is for the due

(10) 2 R. S. 146-7. See 6 J. Ch. 178. 182. 4 J. Ch. 187. &c. 690. 2 J. Ch. 391-225. 1 J. Ch. 110. 604.
(11) 2 R. S. 147. § 57.
(12) ib. 147. § 52.
(13) R. 163.
(1) See 2 R. S. 385. 113. 3 J. Ch. 361. and n. 8 Cowen 311. 308-9.
(2) 2 R. S. 91-5-99, &c. 4 J. Ch. 409. 411. 6 Cowen 224. 222.
(3) ib. 152.
(4) As to account vid. 2 C. C. in E. 1. 38-53. 20 J. 584-5. 1 Hopk. 212. 3 J. Ch. 351. 361. 10 J. 587. 595-6. 9 J. 470. 493. see 1 Paige 41. 1 Cowen 717. see further 1 J. Dig. 160. 205-215. 233. 235-6-9. 240. 254. 336. vid. forms, Eq. Draft. 200. 244. 248. 252. 203. 241 197. 14. 25. Bla. 62. appx. see 4 J. Ch. 651. 619.

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administration of a testator's estate, brought by one or more in behalf of themselves and all other creditors [see ante ch. 3. § 17, 18.] who may come in under the decree for an account and application of the assets of a deceased debtor, in payment of their demands. The decree being applied to all creditors, the others may come in under it, and obtain satisfaction equally with complainant, and if they do not, they will be excluded the benefit of, and yet bound by the decree. Creditors may cite executors or administrators to account before a surrogate, and compel a sale by them of the real estate of the deceased debtor if after the account it appear that there are not sufficient assets to pay debts.(5) They have their remedy against executor's administrators, in the first instance ; the heirs of an intestate and the heirs and devisees of a person who died after making his last will, are respectively liable for the debts of the deceased by simple contract or specialty to the extent of the estate, interest and right, in the real estate descended or devised to them ; and after it shall appear that personal assets are insufficient to pay such debt, or that after due proceedings before the proper surrogate's court, and at law, the creditor has been unable to collect his debt from the personal representatives, or from the next of kin or legatees, then, but not until the personal assets shall be thus exhausted, the heirs of an intestate become liable to the extent of the estate descended.(6) The heirs must be prosecuted jointly in equity, and are not liable to any suit at law. The bill thus filed to charge them, on account of the lands descended must specify, with convenient certainty, the real estate so descended.(7)

7. INJUNCTION AND NE EXEAT.

§ 23. Application for allowance of injunction or receiver before filing the bill.—See *forms, references to forms, and practical directions, post* vol. 2. ch. 6.

An injunction, ne exeat republica, and also the appointment of receiver, may all be resorted to in the same cause to aid the court in doing justice.(1) The allowance of the writs may be obtained before filing the bill and issuing the process, as directed hereafter. An injunction is a remedial writ founded in the preventive po-

(5) 2 R. S. 92-5. 108.
(6) 2 R. S. 452. 450, &c. 447, &c. 113, &c. 72. 82. 87. 92, &c. 108. 4 J. Ch. 671. 682. 687. 619. 20 J. 554. see *ante* ch. 3. § 17.
(7) 2 R. S. 454.
(1) 1 Paige 261.

Injunction.

licy of equity, in the nature of a prohibition to restrain, before the mischief is felt and the remedy unavailing—an unjustifiable act, which good conscience condemns; and in the nature of a mandamus, to enjoin and enforce thereupon what good conscience approves. In practice it is preliminary or special, but never of course, and in operation temporary or perpetual. It is granted to restrain a suit or stay proceedings at law before or after a trial, verdict or judgment, not on the ground of paramount power amid conflicting jurisdictions, but because a party is using a jurisdiction contrary to equity and good conscience. It is granted also on other grounds of equitable relief, before stated[§ 1. &c.] to stay waste, trespass, or nuisance, where the mischief would be irreparable; to restrain the infringement of a patent; the sale of books and prints; or the sale or further disposal of property by a trustee, executors, &c. or of property subject to a lien; the sale or transfer of stock; the negotiation of bills, notes or commercial securities; to restrain under certain limitations, the acts of commissioners under a statute; the operations of corporate bodies transcending their powers; [see ante ch. 5. § 18.] to protect privileges secured by statute; to restrain breach of covenant, or agreement, or the use of a copartnership name, or in behalf of creditors, a purchaser from paying the consideration to vendor; to protect, on the principle of preventive policy, the enjoyment of chattels or realty; to prevent the removal of the former beyond the jurisdiction of the court, or an encroachment on the possession of the latter.(5)

§ 24.

Bill for injunction or ne exeat.

The bill for an injunction (6) or ne exeat (7) or for both, being prepared is verified as directed [ch. 2. § 5.] but as the defendant may answer on oath, and must do so (whether an answer on oath be required by law or be waived or not) in order to obtain the dissolution of a preliminary injunction or the discharge of a ne exeat,(8) yet where an answer on oath is waived in the bill, if in addition to the usual oath of the party, the material facts in the bill on which the injunction or ne exeat rests are duly verified by the affidavit of a credible and disinterested witness, annexed to and filed with the bill, it will not

(5) see also 2 R. S. 173. 462-4.
(6) See as to injunction bill and affidavit. 1 C. C. in E. iii. 2 ib. 175. 1 J. Cas. 417. vid. 434.
(7) As to ne exeat bill, Bla. 411, 412. and affidavit. see *post.*
(8) R. 36. 37.

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be a matter of course to dissolve the injunction or discharge the ne exeat on the oath of the defendant alone, but the court in its discretion may retain it until the hearing.(2)

§ 25. Injunction, to stay proceedings at law.; bond or deposit thereon.

The injunction bill in addition to the requisites before mentioned [§ 3,&c.] must, if filed to stay proceedings in a suit at law, state the situation of such suit, and whether an issue is joined or a verdict or judgment obtained; for if not joined or obtained and the bill is not a mere bill of discovery or to aid the defence in the suit at law, the vice-chancellor or master on whose certificate the injunction is granted must direct a provision to be inserted therein, as hereafter mentioned.(3) If the injunction be to stay a suit at law, a bond with sureties or deposit as required by the statute, must be filed and perfected before the injunction can issue: if to stay a trial at law, then a bond with sureties merely; if to stay proceedings after verdict, then a deposit of the amount, if after judgment, then the full amount or a bond in lieu thereof conditioned to pay all further damages and costs as particularly directed by the statute.(9)

§ 56. Ne exeat; affidavit to ground the application.

In England the writ of ne exeat regno is a high prerogative writ depriving the subject of his liberty, and was formerly confined to state purposes, but is now extended to private remedies. It is not in this state a prerogative writ(12) and though in civil cases its allowance rests in sound discretion (13) yet in a proper case it is not discretionary, but a writ of right,(14) and may issue against a foreigner or citizen of another state on demands arising abroad(15) and who happens within our jurisdiction(16). It is applicable, however, not to a debt recoverable at law, but to an equitable demand(17) in the nature of a debt actually due(18)and satisfactorily ascertained,not resting in a mere declaration of belief of the existence and amount of the claim(19) except as to the precise sum,(20) and to sustain the application, sufficient equity must appear on

(2) R. 36. 37.
(3) R. 33.
(9) See 2 R. S. 188-190. c. 1. t. 2. art. 5.
(12) 1 Hopk. 496
(13) 2 Mad. 182. 1 J. Ch. 441.
(14) 1 Hopk. 496.
(15) 3 J. Ch. 412.
(16) 1 Hopk. 496.
(17) When or not, see 6 J. Ch. 138. 1 J. Ch. 1. 2 J. Ch. 169. See Bla. 408-9. and authors.
(18) 2 J. Ch. 169. 1 J. Ch. 1 Sed. ib. 441.
(19) 3 J. Ch. 75.
(20) 7 J. Ch. 189.

the face of the bill; a mere apprehension of misapplication of funds or breach of trust by defendant, being insufficient,(19) and although the defendant is about leaving the state, yet the debt must be endangered by his departure. The affidavit(3) accompanying the bill, in the first instance, or constituting the ground of subsequent petition or motion, must show the demand to be of the foregoing description. If the defendant be an executor or administrator, the affidavit must state that *assets* have come to his hands in order to give equitable jurisdiction.(4) The affidavit must be positive as to the indebtedness of the party, even if a matter of account, though it may be upon belief as to the amount of the precise sum;(5) positive also of a threat or purpose of the party against whom the writ is prayed of going abroad, and that the debt would be lost, or at least in danger, by his departure from the state,(6) though it need not allege that the purpose of going is to avoid it.(7)

§ 27. Injunction or ne exeat when issued; how allowed before bill filed, by injunction masters, vice-chancellors, or chancellor.

No *injunction* can issue in any case,(9) or a *ne exeat republica*,(10) until the bill be filed. But in either case, a certificate for an order that injunction or ne exeat issue, may be granted on presenting the bill to the proper officer before bill filed, and the writ will be issued upon the filing of the bill, and entry of an order pursuant to that certificate. One of the masters in each circuit is designated by the chancellor as the injunction master for such circuit. If the suit or proceeding is before the chancellor, an order for an injunction or ne exeat may be entered on the certificate of a vice-chancellor, or of the injunction master of the first or third circuits, endorsed on the bill or petition. If before a vice-chancellor, the order may be entered on the certificate of any of the vice-chancellors; and if the vice-chancellor of the circuit where the suit is brought reside more than twenty miles from the clerk's office in such circuit, or is absent from his usual place of residence, the order may be entered on the certificate of the injunction master, in such

(19) 3 J. Ch. 412.
(3) vid. Bla. 413. 1 J. Ch. 441. 364.
(4) 6 J. Ch. 138.
(5) 7 J. Ch. 189. As positive as when an affidavit at law is made to hold to bail. 2 Mad. 184: stating the facts and grounds of indebtedness. ib.
(6) 3 J. Ch. 75.
(7) 7 Ves. 417. 2 Mad. 184.
(9) 2 R. S. 179. § 71.
(10) 3 J. Ch. 75. Bla. 408. and authorities. Sed vide ib. 409.

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circuit. In the first circuit it may also be entered on the certificate of the injunction master, whether the vice-chancellor be present or absent. But no such ex parte order shall be granted either on a supplemental bill or otherwise, after the defendant has appeared in the original suit.(11) The preliminary injunction before answer is a matter resting altogether in the discretion of the court, and ought not to be granted unless the injury or necessity is pressing, and the delay dangerous. There are many cases in which the complainant may be entitled to a perpetual injunction on the hearing, where it would be manifestly improper to grant an injunction in limine. The final injunction is in many cases matter of strict right, and granted as a necessary consequence of the decree.(12) No injunction to suspend the general and ordinary business of any bank, or other monied corporation; or to compel a defendant to refrain from doing any other act where the injunction must necessarily produce great and irreparable injury to the defendant if the claim of the complainant is not sustained, shall be allowed, except on a direct application to the chancellor, or to the vice-chancellor having jurisdiction of the case. And in any case where no special provision is made by law as to security, the officer allowing an injunction may, in his discretion, require of the complainant or his agent, a bond with security, or his own bond only, to the party enjoined, in such sum as may be deemed reasonable, conditioned to pay such party all damages he may sustain by reason of the injunction.(13) If the vice-chancellor or master, to whom application for an injunction is made, think the defendants or any of them should be heard on the question before the injunction be granted, he may refuse to allow the same ex parte, and instead thereof, may direct an order to be entered, requiring the defendants to show cause before the court, on a regular motion day, or some day in term, why the injunction should not be granted. He may also direct on which of the defendants the bill and order to show cause shall be served, and the time and manner of such service.(14) If the injunction is to stay proceedings at law, and it appear, as it ought from the bill itself, if it be the fact, [ante § .] that no issue has been joined, or verdict or judgment obtained in the suit

§. 28
Masters not to allow injunctions in certain cases. The injunction masters may require security. Order to show cause; hearing on a motion day; order in case injunction is to stay proceedings at law, and security thereon.

(11) R. 30.
(12) 1 Paige 97.
(13) R. 31.
(14) R. 32.

at law, and the bill is not a mere bill of discovery, or to aid the defence in the suit at law, the vice-chancellor or master on whose certificate the injunction is granted, must direct a provision to be inserted in the injunction, that the defendant be at liberty to proceed to judgment at law, without prejudice to the equitable rights of the complainant, notwithstanding the injunction. But the complainant in such cases may, on application to the court and sufficient cause shown, obtain an absolute injunction to stay all proceedings in the suit at law, or all proceedings after issue joined, in the discretion of the court.(15) If issue has been joined, or verdict or judgment obtained, the statute interposes its prohibition to the issuing of an injunction without bond or deposit, as before mentioned. If the application to the chancellor, vice-chancellor or master, for an order that an injunction or ne exeat issue, be refused in whole or part, or granted conditionally, or on terms, no subsequent application for the same purpose, and in relation to the same matter, can be made to any other master. Any such subsequent order would be void, and be revoked by the chancellor or vice-chancellor of the circuit on proof of the fact; and the person making such application would be liable to fine and imprisonment by the court.(16)

§ 29. Certificate allowing the injunction or ne exeat; preparing the writs.

If the application be allowed, the officer will endorse on the bill or petition, a certificate,(17) adapted to the case, in conformity with the preceding rules, allowing an order to be entered, upon filing the bill, that the writ prayed or applied for issue. If a ne exeat be applied for, the certificate will state the sum for which the sheriff shall hold to bail. In determining the amount, the officer will exercise a sound discretion under the circumstances of the case, having regard to the rank and situation of the parties and the property of the defendant.(18) The writ,(19) of ne exeat, when prepared, is directed to the sheriff, commanding him to cause the defendant to appear, give security in a sum certain that he will not depart, or in default, commit him to prison. The sum certain is the amount thus determined and di-

(15) R. 33.
(16) See 2 R. S. 173. § 32-4.
(17) Vid. Bla. 413. 410. 411. 391-2. 389. 393.
(18) 1 J. Ch. 441. 364. 1 Hopk. 496.
(19) Vid. Bla. 414.

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rected, and will be the penal sum of the bond which the sheriff will take.(20) In point of form in other respects the writ is to be regulated by the general provisions with regard to all process, laid down in the next section. The writ of injunction, a form of which has been approved by the chancellor,(21) must also conform to the general provisions in the next section, (except that though tested, it has no return,) and in the enjoining part, be varied to the circumstances of each application. It is directed to the party, his agents, &c. commanding and enjoining them to refrain from doing the acts set forth in the bill or petition, and in conformity with the order thereupon to be entered pursuant to the certificate before mentioned.

§ 30. Process generally, its form, test, return. Subpœna.

All writs and process, excepting otherwise provided by law, must be in the name of the people of the state,(1) made out in a legible character,&c.(2) and if issued out of chancery, under one of the seals of the court, impressed; and when, from its nature, it is required to be executed by the sheriff of any county, must be so directed.(3) In form,(4) process is the same substantially, expressive of the intent, as that used prior to the recent re-organization of the court. It is tested in the name of the chancellor, on the day it is issued, and made returnable according to the fact, either before the chancellor, or before the vice-chancellor having jurisdiction, in the court of chancery, on the return day, wheresoever the said court shall then be; and unless otherwise directed, it may be made returnable on any day, except Sunday, either in vacation or in term. If the chancellor is a party, or interested in a suit, process therein must be tested in the name of the vice-chancellor, before whom the suit is pending.(5) All writs and process must be subscribed or endorsed by the solicitor or other person issuing the same, before the delivery of the same to any officer to be executed.(6) Process of subpœna to appear and answer, must be in the form prescribed by the court.(7) It is in the name of 'The people of the State of New-York, to——greeting,' 'commanding him that he personally ap-

Subpœna.

(20) 1 Hopk. 496.
(21) Rules appx. No. 3.
(1) 2 R. S. 275. § 8.
(2) ib. § 10. ante ch. 2. § 6.
(3) ib. 179. § 66-8.
(4) ib. 178. § 65. R. 19.
(5) R. 19.
(6) 2 R. S. 278.
(7) R. 20.

pear before our chancellor, (or vice-chancellor of the —— circuit) in our court of chancery on ——— wheresoever the said court shall then be, to answer to a bill of complaint exhibited against him in our said court, by ———, and to do further and receive what our said court shall have considered in that behalf, and this he is not to omit under the penalty of two hundred and fifty dollars.' It is tested and made returnable as before directed, signed by the register, assistant register or clerk. All the defendants' names must be inserted, and the copies intended for service be inscribed "Copy" and signed by the complainant or his solicitor.(8) The subpœnas may now be obtained, in blank, under the seal of the court, the register, assistant register and clerks being required on request of solicitor and payment of fees, to furnish such blanks.(9) Process for appearance cannot issue until the bill praying the same be filed.(10) But the irregularity of issuing and serving the subpœna before bill filed would be waived by subsequent appearance.(11)

§ 31. Further steps before bill filed; petition for leave to file bill.

In any case where petition and bill are concurrent remedies, [see ante ch. 2. § 2. ch. 4. § 24. 33. ch. 5. § 1. 19. 22. 29.] a pettition, setting forth the facts and reasons why a bill should be preferred, may be prepared in the usual manner, [ib. § 5, &c.] and accompanied by the certificate of counsel who have examined the case, be presented ex parte on a regular motion day. [ib. § 14.] If the chancellor, on looking into the case, or after reference for further enquiry, if any be deemed necessary, grant leave to file a bill, an order accordingly will be entered, as directed in a prior chapter. [ib. § 32-3.]

§ 32. Notice of the object of the suit to serve; notice of lis pendens to file.

On a bill for foreclosure and sale, a notice may be prepared to be served on any defendant, stating the nature and general object of the suit, &c. as before directed, [ante § 10.] the design of which would be to preclude incumbrancers having no defence, from claiming costs, if they appear. To render the filing of a bill, construc-

(8) R. 21.
(9) 2 R. S. 179. § 69.
(10) 2 R. S. ib. § 70. The former statute [1 R. L. 489. § 8.] which was similar to the English 4 Ann. c 16. S. 22. excepted cases of bills for injunctions to stay waste or a suit at law; in which cases the subbœna might issue before bill filed. The revised statutes make no exceptions.
(11) 1 Younge and Jervis 570.

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tive notice [see ch. 5. § 31. and ante § 31. 27.] to a purchaser of any real estate, the complainant must file with the clerk of the county in which such lands are situate, a notice of the pendency of the suit, setting forth its title the general object thereof, and a description of the land. The clerk is to index, for convenience of reference on searches, all such notices.(4) This is an important preliminary, for without such notice, a purchaser of the property under a judgment giving a priority of lien, obtained after filing the bill, would be protected.(5)

§ 38. Security filed for costs before filing bill; security or deposits prepared before injunction can issue.

If the complainant be a non-resident, trustee of a debtor, discharged insolvent, imprisoned criminal, or next friend of an infant as mentioned, [see ante ch. 4. § 2.] and prosecute *in person*, he must, before filing the bill, file security for costs, as directed, [ante ch. 3. § 3, &c.] or if he prosecute by solicitor, and no security be filed and justified, the latter becomes personally responsible to a certain amount; [ib.] but the defendant nevertheless, if he appear, will be entitled to claim security and to stay proceedings as hereafter described. [ch. 8.] If a certificate has been obtained in the manner before directed [§ 25-7.] for an order that an injunction issue, and the injunction be to stay proceedings at law, the bond required by the statute, and directed in the certificate to be given prior to the sealing and delivery of the injunction, must be executed, and a certificate of a master, or the affidavits of sureties endorsed or annexed thereto, as also directed by the statute,(6) preparatory to the filing of the same, with the register, assistant register, or clerk. If a bond be not given, or a bond in lieu of deposit ordered in the specific cases directed by the statute, the deposit must be paid over to the register, &c. prior to the sealing of the injunction. In the case of a bill of interpleader, [ante § 18.] where an injunction was prayed to stay a suit, the condition of allowing it, would be a compliance with the directions of the statute. But if to restrain the commencement of a suit, the condition would probably in that case, be that the money in controversy should be brought into court.

(4) 2 R. S. 174. § 43.
(5) See 1 Wend. 478. 4 J. Ch. 38. 1 J. Ch. 576. 16 J. 309. 2 J. 510.
(6) 2 R. S. 188-190.

§ 34. Draft orders, or precipes for orders to be entered on issuing of process.

An order drafted pursuant to the certificate allowing an injunction or ne exeat, and a draft order or written request as an authority for the entry of the common order for defendant's appearance, (precipes being virtually abolished) [see ante ch. 2. § 27, 28. 32-3.] will finish the preparations to the filing of the bill and issuing the process.

CHAPTER VII.

PRO CONFESSO,

OR

PROCEEDINGS BY DEFAULT FROM BILL TO FINAL DECREE.

§ 1. Filing bill, &c. bonds, making deposits, entering orders, sealing and issuing process.

In all cases not otherwise provided for by law, bills may be taken as confessed, and orders and decrees made by default, according to such rules as the chancellor may establish.(1)

Having cautiously pursued the preliminary measures by petition or otherwise, directed in the preceding chapters, the complainant, in person, by next friend, committee, or solicitor, is now prepared to file in the proper office, [see ch. 2. § 34.] his bill of complaint with its annexed papers, and the bonds for costs and to stay suit at law upon injunction, as described in the last chapter. If a deposit in lieu thereof, or if money be brought into court in any case as proffered in the bill, the register, assistant register, or clerk, will enter the same to the credit of the cause in his register, and place the same in bank, or upon safe investment, pursuant to the statute and rules upon the subject.[ante ch. 1. § 12.] The orders prepared as directed in the last chapter being now entered, the register, assistant register, or clerk, after examining the injunction to ascertain before it passes the seal, that it is filled up pursuant to the order which must conform to the certificate, will seal the same. The subpœna also will, unless a blank had been taken out and prepared before hand, be filled up and sealed. The process is now in readiness for service.

(1) 2 R. S. 179. § 74. 1 J. Ch. 10.

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SERVICE.

§ 2. Service of subpœna, injunction, ne exeat; notice of the suit, to serve, and of lis pendens to file; notice also of motion for receiver.

The subpœna and injunction may be served by any person competent to make affidavit [see ch. 2. § 7.] of service. The *ne exeat* is directed and delivered to the sheriff, who if required is bound to execute all process out of this court. [ch. 1. § 14.] Where the defendants reside at a distance, the most convenient course will often be, to inclose to the sheriff, all process, with the originals and copies of the notice of the object of the suit to be served on the defendants, and of the *lis pendens* to be filed in the clerk's office of the county, in which the lands are situate. As an accompaniment to such service the complainant may prepare a petition with notice of presenting the same and of the motion thereon,[see ch. 2. § 4-10.] or notice of special motion, grounded on the bill, if it pray appointment of receiver, supported by affidavit of its immediate necessity, as where the fund is in danger;(5) and cause copies of the petition, affidavit, &c. notice of special motion to be served on the defendant for a regular motion day, and for the usual time; [ib. § 10-15.] but if the urgency of the case require the immediate interposition of the court, the petition, &c. may be presented, and the motion made, out of the regular course, and in certain cases without notice, in the manner herein before directed. [see ch. 2. § 12. ch. 5. § 18, &c.] The proceedings for such appointment will be further alluded to, after the services shall have been made.

§ 3. Service, when, on whom, and how made.

No writ, process, order, decree or other proceeding in civil cases, can be served on Sunday.(6) Where any controversy or cause of action exists between towns, or any town and an individual or corporation, the town is sued by its name, but the service of the first process must be on the supervisor.(7) In suits by or against counties in their coporate capacities, proceedings are in the name of the board of supervisors, (who, in New-York, are the mayor, recorder and aldermen) and the first process is served on the chairman or clerk of the board.(8) If the state is a party, service is usually on

(5) 1 Hopk. 429. also other cases when and how receiver will be appointed 1 Paige 298. 261. 3 J. Ch. 48. 1 J. Ch. 57. 60. 4 J. Ch. 429. 368, 38-9. 628. 1 Hopk. 114, 429.

(6) 1 R. S. 675. 20 J. 140. 12 J. 178. 180-1. 3 J. 257.

(7) 1 R. S. 337. 356-7.

(8) 1 R. S. 384. 368. § 17.

the attorney general, [see ch. 5. § 29.] whose duty is to defend all actions in the event of which the people of this state shall be interested.(9) Service on certain corporations is made on the president, cashier or secretary. CHAP. VII.

Subpœna.

All the defendants' names being in the subpœna, it may be served by "copy," inscribed and signed by complainant or solicitor, showing the original and seal of the court, personally, or in case of absence, on defendant's wife, servant, or member of his family, at his place of abode, on or before the appearance day.(10) Where defendant resides abroad, service of a subpœna may be made personally,(11) or in an injunction cause to stay suit at law, may be allowed on motion, to be made on the attorney. Thus in England, an attachment on special motion, grounded on a correspondence between solicitors, admitting the service to have been made on defendant at Paris, was granted for non-appearance to a subpœna thus served.(12) In injunction bills, where the defendant resides abroad, and an application is made that service of process on his attorney at law may be good service, the court of chancery, in England, requires the bill to be accompanied by an affidavit by the plaintiff, of merits. In the equity side of the Exchequer, the affidavit is not required until the motion is made for the injunction.(13) The affidavit of merits, viz. as to the equity of the bill, must be made by the complainant, not his solicitor, unless he has personal knowledge of the merits.(14) It has been held that the affidavit need not state a previous offer to the attorney and refusal of the subpœna.(15) But on an application for substituted service of subpœna on bill of interpleader, it has been held that the party applying must not only state that he knows not where the plaintiff at law is to be met, and that solicitor has refused to appear, but that he has positively refused to give information where he was to be found: process must also have been formally tendered to the solicitor.(16) The principle of substituted ser-

(9) 1 R. S. 179.
(10) R. 21.
(11) 18 Ves. 496. 4 Bro. C. C. 213.
(12) 1 Simons 389.
(13) 1 Younge and Jervis 570.
(14) 3 Madd. 550.
(15) 13 Ves. 593.
(16) 6 Price 404. see 4 Ves. 339.

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vice in this case, on the attorney is, that the attorney is the constituted agent of the party suing at law, and that the bill in equity is a defence to the demand. The practice, it is said, is confined to injunction causes, and does not extend to service on one acting under a general power of attorney.(17) But the court exercises a discretion in allowing substituted services. On a bill against two partners, one abroad, service on partner at home was allowed for both ;(18) so service on a partner or acknowledged clerk of defendant at his counting house.(19) The service of subpœna on husband in a bill against him and his wife is sufficient, and he will answer for her, unless relief is sought out of her separate estate, when service must be personal,(20) with a separate subpœna,(21) or copy showing the original. Service on the father-in-law of an infant,(22) or on the mother secreting the infant,(23) has been held good service. Where service was attempted, but defendant refused to open the door, and the writ was left hanging at it, or put into the house by any means, it is good service if proved to have come to defendant's hands, or that he was in the house and had notice of it.(24) If the subpœna be not served before return day, a new subpœna may be taken out of course, as often as necessary, or an alias or pluries be issued.(25) If defendants reside in different parts of the state, two or more subpœnas may be issued and transmitted with copies for service, but all the defendants' names must be inserted, and if served by copy, the accuracy of each copy should be carefully looked to.

§ 4. Service of injunction; service of ne exeat.

Service of the writ of injunction is by delivering a true copy, showing the original to defendant, under seal; the same to his attorney or agent. But personal service is sometimes dispensed with by the court, on affidavit of circumstances, showing the impracticability, as where party is abroad, or not to be found, or denied, or not met with at his house after many fruitless applications, especially if detailing them, and substitution of service on attorney, or at the last place of abode is allowed instead.(26) In

(17) 1 Sch. and Lef. 238. 3 Bro. C. C. 386. see 1 Dick. 39.
(18) 1 Madd. 187.
(19) 1 Price 92.
(20) 2 J. Ch. 139.
(21) 9 Ves. 488.
(22) 8 Ves. 14.
(23) 1 Dick. 18.
(24) Harr. 104. Grant. 125.
(25) R. 19.
(26) 1 Grant 279. Hind. 595. Harr. 546. 14 Ves. 206. Bla. 402.

case of waste or injury, service should be upon servants, workmen, and all employed, as well as on the party, solicitor and agent.(28) In England where an injunction to restrain communication had been obtained on affidavit of an intended marriage with an infant ward of the court, service at a house, which appeared to be the defendant's last place of abode, though apparently shut up, was allowed to be good service, where keeping out of the way to avoid service seemed to constitute part of the fraud.(29) The ne exeat has the force of a *capias* ad respondendum, and upon personal service the party is bound, it is said, to appear and put in his answer, and may then apply to supersede the writ, but not on his affidavit only, without security.(30) In the arrest and imprisonment of the defendant for want of bail, the sheriff is to pursue his duty as prescribed by statute.(31) If defendant give bail, the sheriff must take a bond in the amount endorsed on the writ, as the penal sum,(32) conditioned that the defendant shall not depart, &c. without leave of the court.

§ 5. Return of service, and proceedings thereon.

The service being made, affidavits in case of injunction,(33) subpœna,(34) notice of the nature of the suit, [ante ch. 6. § 32.] notice of application for appointment of receiver, [ante § 2.] as the case may be, [ante ch. 6. and return of the sheriff to the writ of ne exeat, being made, annexed to the originals, and filed; the complainant may proceed: 1. If the injunction be violated, to enforce it by process of contempt: 2. If the bond taken upon the ne exeat be forfeited, to procure its

(28) Turn. and Ven. 980. Grant 285.

(29) 14 Ves. 206. In England, if a marriage be contemplated with an infant ward of the court, (who can be made such on filing a bill) the practice there is to apply to the court by petition for a reference to a master to consider if the proposed marriage be proper, and on approval, then for leave to lay proposals for a settlement before him. Such reference has been granted against an adverse guardian opposing it. Contempt may be there committed by the illegal marriage of a male as of a female ward, and ignorance of the infant being a ward does not excuse the contempt. (3 P. W. 116. 1 Coop. Ch Ca. 225. 19. Ves. 451. 3 Ves. and B. 172. 8 Ves. 79.—1 Ves. 154.) All parties are, upon application of guardian or others interested, ordered to attend court and the husband committed; but if not an aggravated case, he is usually discharged on executing a settlement. (ib.) But see 4 J. Ch. 378.

(30) 5 Ves. 96.

(31) 2 R. S. 426, 427. 440.

(32) 1 Hopk. 496.

(33) Bla 34. appx.

(34) Ib. 39. appx.

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prosecution: 3. If the defendant do not appear, and oppose the appointment of receiver, proceed ex parte: 4. If defendant do not appear in obedience to the subpœna, enter an order for such appearance, and upon non-appearance thereupon, proceed to take a decree pro confesso, or compel appearance by attachment.

§ 6. Attachment, &c. for violating the injunction.

On breach of *injunction restraining* an act, the practice in England, is a motion on notice and affidavit, that the party be committed; but if *to do* an act, an order is obtained, on motion, limiting a particular day for doing the act, or that defendant stand committed.(1) In the former case the service of notice for commitment must be personal, even though counsel undertake to appear for the party; and if the original writ be required, the motion cannot be made without producing it.(2) Here the legislature has wisely defined and regulated not only the proceedings as for contempts in civil cases, but criminal contempts of court; and thus while it gives to the administration of justice, a proper degree of vigor to enforce civil remedies and protect the rights of parties, interposes a barrier between the hitherto undefined powers of the courts and the liberty of the citizen. Among the contemots so defined, is disobedience to any process issuing out of the court. In the present instance, the court may, upon being satisfied by due proof by affidavit of the facts constituting a breach of the injunction, either grant an order to show cause why the party should not be committed, or issue an attachment to bring such party before the court to answer. The party, however, is entitled to a copy of the affidavits and a reasonable time for defence, before any fine or imprisonment can be inflicted. The proceedings as for contempt in this and other cases, are particularly regulated by the statute.(3) If an attachment issue, by special order of the court, upon such application, the order will direct the penalty of the bond to be taken for the defendant's appearance, to answer. The endorsement of the attachment by the clerk, the duty of the sheriff upon the arrest, his own liability to attachment for not returning the attachment issued, as directed

(1) Grant. Harr. 488. Bla. 403. 6 Ves. 540. tit. 13. ch. 8. pt 3. R. 26. and appx. to Rules. No. 2. see ante ch. 2. § 84. see criminal contempts of courts, also defined and regulated by 2 R. S. 278.

(2) 1 Jac. & Walk. 376.

(3) See proceedings as for contempt in civil cases. 2 R. S. 534-

by the statute, the forfeiture and prosecution of the bond for non-appearance, the interrogatories to be filed if defendant appear, his answers thereto under oath, the counter and supplemental proof, the power of the court thereupon to determine the contempt, to fine and commit the accused, and other matters connected with the proceedings, are prescribed in the statute. If the violation of the injunction was in omitting to perform some act or duty yet in the party's power, he will be committed until he perform such act or duty, pay such fine as may be imposed and the costs and expenses of the proceedings, which act or duty, fine and expenses, must be specified in the order and process of commitment.

§ 7. Appointment of receiver.

Upon affidavit of service of copy of petition, affidavits &c. or notice of special motion, affidavits, &c. as directed, [ante § 2.] the complainant will, on the motion day noticed, proceed as directed in a former chapter [ch. 2. § 10-26.] to obtain, enter and serve an order [ib. § 27-36.] for a reference [see ib. § 36, &c.] to a master, to appoint a receiver of the estate in question. The complainant will leave with the master a state of facts and proposal, containing a statement of the property, and nominating or proposing a receiver and sureties. The stating part is supported by affidavit; summonses for attendance of parties interested, underwritten, pursuant to the object of the reference, are taken out; the day for proceeding upon the proposal appointed, and the order of proceeding regulated by the master as directed. [ante ib. 38-42, &c.] A counter proposal or nomination may be made, and the master will exercise his discretionary choice, unless, when authorised by the order, he appoint a receiver on each side, by consent, or on his own opinion. Two or more receivers are sometimes appointed, where the property is very large, or the estates are distantly situated from each other. The written consent and recommendation of as many of the parties interested in the appointment as can be obtained, may accompany the proposal. This would facilitate and add weight to the choice. The fitness of the receiver being determined, the sufficiency of the sureties ascertained by testimony, their own affidavit being usually taken that they are respectively worth double the sum, which shall have appeared to be the yearly value of the estate, a bond or

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recognizance similar to that of a committee, [ch. 4. § 16.] being entered into, approved and filed by the receiver and his sureties, conditioned for the fidelity of the trust, and to account to the court, &c. the master thereupon makes his report of the facts, stating the proposal, his approval thereof if so, the sufficiency of the sureties as ascertained, the recognizance, and that he has appointed and thereby appoints the person so named and approved, as receiver of the estates in question. The report being filed in the proper office, [ch. 2. § 33.] an order *nisi* [ib. § 30. 32. 52, 53.] confirming the same, is entered of course.(6) As the appointment is in the discretion of the master, he need not assign his reasons therefor. No exceptions can be made, unless there be a substantial objection shown to the appointment; but the most usual course is to apply for an order, for the master to review his appointment. A certified copy of the master's report, and of the order of confirmation, constitute the appointment and authority under which the receiver will act. His powers and duties, as well as the proceedings upon his appointment are, in many respects, similar to those of a committee, [see ch. 4. § 14.] or guardian, [ib. § 27. ch. 5. § 2.] governed by the same rules of court; copies of which are to be delivered to them by the register, assistant register, or clerk, as heretofore mentioned. [ch. 4. § 17.] In proceedings against, or upon the voluntary dissolution of corporations, the legislature has defined and prescribed the powers and duties of receivers, and the mode of settling their accounts. [see ante ch. 5. § 18. 22. 27, 28.]

§ 8.

Pro confesso; arrangement of proceedings under this head: See *forms*, *post*, Vol. II. ch. vii. and *practical directions* for conducting particular suits. ib. ch. x

If the subpœna [ch. 6. § 30. ante § 3.] was served, the complainant may proceed to take a decree pro confesso, for non-appearance; if not served, a like decree in proceedings against defendants, non-resident, absent or concealed; or if defendants appear, a like decree, for want of answer, and in either case such further steps by petition, motion or otherwise on his part, as may be necessary to secure fully the object of his bill. To trace and methodise the intricacies of a complex practice; to ex-

(6) see proceedings on appointment of receiver & forms. Bla. 451. 453. Hoff. Mr. 154-6. 374-6. appx. No. 47-50. & see authorities ante § 2. Eq. Draft. 604-5. Proceedings on passing accounts. Hoff. 157. 165.6. to vacate recognizance. Eq. Draft. 607. Grant 260.

hibit an arrangement in which each progressive step may render the next clearer and more certain, is the object, however feebly accomplished, of this treatise. I shall, therefore, in considering the leading head of this chapter, endeavor to point out the different proceedings to take a decree as confessed, in the following order: 1. Upon *non-appearance* on *personal service* of subpœna: 2. Upon *non-appearance* on *personal service* or *publication* of an *order* to appear, the defendant being *non-resident*, *absent*, or *concealed*: 3. Upon *non-appearance* on *service* of subpœna *not personal*, and proceedings to compel appearance: 4. Upon *no answer after appearance*, and proceedings to compel answer. The further proceedings on the part of the complainant, in anticipation of those of the defendant in the next chapter, will close the present.

1. NON-APPEARANCE ON PERSONAL SERVICE.

§ 9. Decree by default, for non-appearance on personal service; bill; subpœna; service.

The proceedings by default to final satisfaction may be viewed, first generally; secondly, in reference to the peculiarities of some particular suits. 1. The bill being prepared and filed as directed, [ch. 6. § 1-7. ante § 1.] a subpœna [ch. 6. § 30. ante § 3.] to appear and answer, may be tested on the day the bill is filed, returnable the next, and served personally as late, if necessary, as twelve o'clock at night(1) of the return day. If the defendant live within 50 miles of the office where his appearance is to be entered, he must enter his appearance within ten days after the appearance day in the subpœna; if beyond, within twenty days, in the office of the register, or assistant register, in suits before the chancellor; if before a vice-chancellor, with the clerk of the circuit where the suit is pending(2) [ch. 2. § 32, 33.] When the subpœna is served on the defendant *in person*, if he do not appear within the time thus limited, the complainant may on filing proof of service, have an order of course that he appear in ten days, or that the bill be taken as confessed, and at the end of that time, if no notice of appearance be received, the complainant may, on filing an affidavit of the facts, have an order to take the bill as confessed.(3)

10 or 20 days after return of subpœna allowed defendant to enter his appearance.

§ 10. At the end of that time, order, for appearance in 10 days thereafter, or pro confesso.

(1) Harr. Grant.
(2) R. 22.
(3) R. 23.

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§ 11. Agreement by consent, that decree pro confesso be forthwith entered, on filing bill and delivering subpœna.

But the above period of ten or twenty days, (according to the distance of the defendant) allowed after return day of subpœna; and the ten additional days after order for appearance before the default for non appearance can be entered, may be saved, by obtaining from the party in person, or his solicitor, where there is no defence, a written agreement in the form of an order by consent, [see ch. 2. § 28. 31.] to take the bill as confessed, &c. or by delivering the subpœna in the first instance to the solicitor, who, to save delay and expense, may forthwith cause an appearance to be entered, waive service of copy of the bill, put in a general answer admitting the claim, or consent to a decree as before mentioned. In amicable suits, as well as in others, where there is no disposition to protract the proceedings the cause may, by consent orders drawn as directed, be prepared for reference or hearing immediately after filing the bill. No formal entry of appearance becomes necessary to the regularity of the complainant's proceedings. For, where the complainant, by request of defendant's solicitor, sent him a copy of the bill requesting an answer, it amounted to an appearance.(4) Where a party named as defendant was never served with a subpœna, nor appeared to the bill, but at the hearing consented by counsel to be bound by the decree, it was held that the defect was cured.(5)

§ 12. Affidavit of service of subpœna and order for appearance; affidavit of non-appearance, & order for taking the bill as confessed.

But if the cause be not thus speeded by consent orders, the complainant or his solicitor, at the expiration of the time allowed for defendant's appearance, files an affidavit(6) of service of the subpœna, (the affidavit being usually annexed to the subpœna when filed,) draws an order which is of course, and which the officer will enter [ch. 2. § 27, 28. 32-3.] that defendant appear in ten days, or that the bill be taken as confessed, and at the expiration of that time, on filing another affidavit that no notice of appearance has been received, draw another order which is also of course, that the bill be accordingly taken as confessed for non-appearance. The bill being taken as confessed, the next step is an order *of course* [ch. 2. § 28. 32-3.] for a reference as in foreclosure, [*post* § .] or partition; [ante ch. 5. § 35.] or a *special order* [ch. 2. § 28. 27.] upon special application on a re-

§ 13. Order for reference, of course or special.

(4) 4 J. Ch. 365. 94. see *post.*
(5) 2 Sim. & Stu. 457.
(6) vid. Bla. 39. appx.

gular motion day, or in term, [ib. § 15.] accompanied by an affidavit of regularity of proceedings, as in case of divorce, [post § .] specific performance, [post § .] or for such order or decree in other cases upon special application, or after the cause shall have been set down for hearing, as the circumstances of the case require.(7) For instance, a reference in account or on a bill to redeem, to take and state an account of what is due, &c.(8) Upon a reference to a master after pro confesso, such allegations in the bill as are distinct and positive, are to be taken without proof. If indefinite, or the demand of the complainant be uncertain, or in detail, then proof will be required.(9) A certified copy of the order is entered with the master, who proceeds upon the reference, pursuant to the order and the standing rules of the court. [ante ch. 2. § 36, &c.] In some cases where the reference is strictly ex parte, as upon computation of amount due on bond and mortgage, the report may be filed, and a copy delivered to complainant the same day in which the order is entered, if the master waive his privilege of appointing other days for attendance, and for settling his report. But as every such cause must be regularly brought to hearing at term, after the coming in of the report before a final decree can be entered; and where the bill is taken as confessed, the complainant must show to the court at the hearing, by affidavit, or otherwise, that the proceedings so taken have been regular according to the rules and practice of the court;(10) the complainant on receiving the master's report will proceed to set down, that is notice the cause for hearing on the first day of the next term, [see terms, ch. 2. § 14-15.] or for as early a day in term as practicable.(11) But as no notice is required to be served on defendants,

§ 14. Setting down cause for hearing at term on master's report.

(7) Upon a bill filed to perpetuate testimony, the complainant may, without waiting for appearance or answer, where the witness is the only witness, sick, &c. [see ante ch. 3. § 11.] 'appiy for commission for his examination de bene esse, in the manner pointed out under the third subdivision of the presen, chapter. Where the nature of the bill requires defendant's appearance as in discovery, or at least the usual process of contempt toward compelling appearance as in interpleader, &c. the proceedings are as directed under the third subdivision.

(8) see Hoff. Mr. 7. 241. Bla. 221-224. see 2 Wend. 77, 78. As to notice to creditors to exhibit their claims in a bill filed by a creditor, or legatee, for himself and others, &c. see 2 R. S. 183. § 106. see *ante* ch. 3. § 18. ch. 3. § 22. *post*.

(9) 1 Hopk. 471. 45.

(10) R. 134.

(11) R. 92.

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who have not appeared,(12) [ch. 2. § 12-13.] the notice is merely for the register, assistant register or clerk, [ib. § 34. see 33.] and comprises the note of issue specifying as in other cases [ante ch. 2. § 59, 60. 69.] the class to which the cause belongs, and the time from which it is entitled to priority. This must be delivered to the register, &c. who is to make up the calendar four days previously to the commencement of the term. But if the cause is not in readiness for hearing in time to notice it for the first day in term, it may as in other cases be placed at the foot of the calendar; and in the present instance, the bill being taken as confessed, may be heard out of its regular order.(13) In making up the calendar, causes to be heard on bills taken as confessed have a preference, and must be entered according to priority from the date of the order to take the bill as confessed.(14) But as motions and petitions have preference over calendar causes, on the first and every subsequent Monday in term, [ch. 2. § 15.] the cause cannot be brought up, unless the motion business be gone through with, until the next day. The necessary papers being furnished,(15) the affidavit of regularity of proceedings, or a certificate of the register, &c. in whose office the cause has been entered, that the proceedings are regular, being with the report of the master, read and filed; and the minutes or draft order or decree sought as prepared, [ante ch. 2. § 27. 32. ch. 6. § 1.] being also read or delivered to the court,(16) and if approved, forthwith entered; [ib. § 33.] the complainant may then proceed to complete or enforce his decree, according to the nature of the same, whether decretal or absolute: if in partition [ante ch. 5. § 29.] by a sale [ib. § 38.] or partition; [ib. § 45.] and by again setting down the cause on master's or commissioner's report for confirmation, final distribution, and investment, [ib.] if in foreclosure, by a sale, &c. [post § 17.] and in either case by taxation of costs, [ante ch. 2. § 80-83.] enrolment of decree, conveyances, execution for residue, enforcing possession, &c. [ib. § 83-5.] Where the decree is absolute in the first instance it may, after costs taxed if any allowed, and all final decrees must, before any process issued or pro-

§ 15. Hearing; decree and execution.

(12) R. 16.
(13) R. 92.
(14) R. 91.
(15) R. 93.
(16) R. 94.

ceedings had thereon, be enroled ;[ib.] and if necessary, execution may then be taken out to enfore it. [ib.] A cause thus conducted and speeded may, where the prior proceedings approach so near a stated term as to enable the solicitor to place it on the calendar, as before directed, be brought to hearing and a decretal order for sale, as in case of foreclosure, or other final decree, if absolute in the first instance, be obtained within six weeks after filing the bill.

FORECLOSURE.

§ 16. Proceedings from bill to hearing.

The bill being prepared and filed, notices and subpœna served as directed [ch. 6. § 8-11. and ante §1-3. 9.] the proceedings to the entry of the order to take the bill as confessed [ante §9. to § 12.] are the same as before detailed. An order of course [ante § 13.] is thereupon entered, referring it to a master [ch. 2. § 36.] to compute the amount due to the complainant and such of the defendants as are prior incumbrancers of the mortgaged premises preparatory to the hearing of the cause ;(1) and if the mortgage be for instalments, to ascertain and report the situation of the premises ; for if it appear the same can be sold in parcels without injury to the interests of the parties, the decree must direct so much to be sold as will pay the amount then due, with costs ; and such decree will remain as security for any subsequent default(2) as hereafter mentioned. [post § 4.] The reference is as before described ; the *report*(3) being filed, and a copy delivered to the complainant, the cause is also brought to a hearing in the manner directed. [ante § 14, 15.]

§ 17. Order for estate; preparations for sale ; particular of sale ; notice ; time ; place, and how conducted.

A decretal order for confirmation of the report and for sale, previously prepared pursuant to the standing rule(4) and the approved form(5) of the court, with the usual requisites as to caption and form [ante ch. 2. § 32.] will if approved, be directed to be entered. If it appear that a sale of the whole will be most beneficial to the parties,

(1) R. 134.
(2) 2 R. S. 193.
(3) see *form* of report, Rules appx. No. 13.
(4) R 135. post.
(5) Rules appx. No. 14. see further as to *decree for sale*. 19 J. 502. 2 J. 499. 490. 4 J. Ch. 37. 534. 140. 18 J. 561. 1 Johns. Dig. 318. 366. 356, &c. Hoff. Mr. 383-6. see also, 212-16. 393.—Bla. 310. Eq. Draft. 647.

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the decree will, in the first instance, be entered for the sale of the whole.(6) In every order or decree for sale of mortgaged premises, the description and particular boundaries of the property to be sold, so far at least as the same can be ascertained from the mortgage, must be inserted; and, unless otherwise specially ordered by the court, the decree must direct that the mortgaged premises, or so much thereof as may be sufficient to raise the amount due to the complainant, for principal, interest and costs, and which may be sold separately, without material injury to the parties interested, be sold by or under the direction of a master, and that the complainant, or any other party, may become a purchaser on such sale; that the master execute a deed to the purchaser; that out of the proceeds of the sale the master pay to the complainant, or his solicitor, the amount of his debt, interest and costs, or so much as the purchase money will pay of the same, and that he take the receipt of the complainant or his solicitor for the amount so paid, and file the same with his report; that he bring the surplus monies, if any there be, into court without delay, and that the purchaser at such sale be let into possession of the premises on production of the master's deed and a certified copy of the order confirming the report of the sale, after the same has become absolute.(7) The order may be so framed as to authorise a sale to the amount of complainant's debt on credit.(8) Unless the decree otherwise direct, the sale must be made by a master in the county where the premises, or some part, are situated.(9) The order for sale being entered, and a certified copy delivered to the master, he will proceed to advertise the premises. The standing rule(10) of the court as to sales by committees, guardians, or masters, is the same as inserted in a former chapter. [ch. 4. § 21.] Lands in New-York are sold at auction at the Exchange between 12 and 3 o'clock, unless otherwise directed. The notice, unless otherwise required by the order, or by law, is published in one or more daily papers in New-York, twice a week for three weeks immediately before the time of sale. Lands in any other part of the state, directed to be sold at auction, must be noticed for the time and in the manner required on sales

(6) 2 R. S. 193.
(7) R. 135.
(8) 1 Hopk. 594.
(9) 2 R. S. 192.
(10) R. 139.

of real estate by sheriffs, and by masters and commissioners [ib. and ch. 5. § 40.] in partition. This, by statute, is six weeks successively, by notice advertised once a week in a newspaper in the county, and affixed in three public places in the town where the land lies, and if sold in a different town, affixed there also. The statute makes provision, where there is no newspaper in the county; precribes the notice, the sale—at auction—the time between 9 A. M. and sunset; the mode of conducting the sale, by offering lots separately, &c.(10) A *particular of the estate* being prepared by the solicitor, and approved by the master, and the proper parcels to be sold, ascertained,(11) an *advertisement*,(12) the draft of which is signed by the master, is prepared descriptive of the property, the time and place of sale, and published pursuant to the decree and the standing rule above mentioned. Where mortgaged premises or other real estate, directed to be sold by a master, consists of several distinct lots or parcels, which can be sold separately, without diminishing the value thereof; on such sale it shall be the duty of the master to sell the same in separate lots or parcels, unless otherwise specially directed by the court; but if the master is satisfied the property will produce a greater price if sold together than it will in separate lots or parcels, he may sell it together, unless otherwise directed in the order of sale.(13) In addition to the required advertisement, it is usual for the auctioneer, in New-York, whom the master engages, to notice the property in his ordinary list of sales. The master may, before sale, satisfy himself of the due publication of notice, by taking from the printer, his foreman or principal clerk, an affidavit annexed to a printed copy of the notice.(14) The master attends at the time and place,

(10) see 2 R. S. 369, 370. 4 Cowen 315.

(11) Bla. 313. Hoff. Mr. 215-216.

(12) See Bla. 316. Hoff. 246. 5 J. Ch. 35. 7 J. 217.

(13) R. 128.

(14) See 2 R. S. 403. The statute authorises an affidavit thus taken of notice of any sale pursuant to a decree to be filed, and it will be presumptive evidence in all cases and before every court of the facts therein stated. But the master's report being evidence of the sale, it is not necessary, as in sales under mortgage at law, (2 R. S. 547.) to file the affidavit, though it may be done.

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§ 18. Prior to the deed; filing or recording the mortgage, taxing costs, and enrolling the decree; deed.

Whenever a master sells mortgaged premises, under a decree or order of the court, it shall be the duty of the complainant, or of such master, before he execute a deed to the purchaser, to file such mortgage in the office of the register, assistant register, or clerk, unless such mortgage has been duly proved or acknowledged so as to entitle the same to be recorded; in which case, if it has not been already done, it shall be the duty of the complainant to cause the same to be recorded at full length in the county or counties where the lands so sold are situated, before the master shall give a deed to the purchaser on such sale; the expense of which filing or recording, and the entry thereof, shall be allowed in the taxation of costs; and if filed with the register, assistant register, or clerk, he shall enter in the minutes the filing of such mortgage, and the time of filing. But this rule shall not extend to any case where the mortgage appears, by the pleadings or proofs in the suit commenced thereon, to have been lost or destroyed.(19) Before any deed can be given, and for the purpose of protecting the title of the purchaser, the party for whose benefit the sale was made, must cause the decree to be enrolled and produce a certificate thereof to the master.(20) But as the taxed bill of costs constitutes a part of the enrolment, [ante ch. 2. § 83.] the bill(21) must first be made out, and may be taxed ex parte, (defendant not having ap-

(15) How conducted, &c. see Bla. 312. n. 318-320. Hoff. Mr. 212-240. Sugden 31-41. see also. 12 J. 521. 1 Hopk. 104. 120, 121. 2 J. Ch. 154.
(16) 2 J. Ch. 154. Hoff. Mr. 216.—
(17) 4 J. Ch. 659.
(18) Hoff. Mr. 216. 220.
(19) R. 137.
(20) R. 111. see form of enrolment of a decree of sale. Hoff. Mr. appx. No. 80.
(21) see a precedent of a bill in this case, Rules. appx. No. 15.

peared) as directed. [ante ch. 2. § 80-2] On filing the same, the decree, thirty days having elapsed from its entry in the minutes, may be enrolled as also directed, [ib. § 83.] and at the request of any party, docketed, and transcripts of the docket sent to the supreme court, to secure a lien. [ib.] This may be necessary, as where the premises are insufficient and an execution against mortgagor or the obligor—a third person made party—is issued for the balance, as hereafter mentioned. [see also ante ch. 6. § 8.] The master having received the purchase money, executes and acknowledges his *deed*.(22) This will vest in the purchaser the same estate, (and no other or greater) than would have vested in the mortgagee, if the equity had been foreclosed, and such deed will be effectual as a bar to any claim of mortgagor or mortgagee, and all parties to the suit, and their heirs, and all claiming under them.(23)

§ 19. Proceeds;—payment of costs; principal and interest; deficiency; surplus.

The proceeds,(24) as directed by the standing rule and order of sale, are applied, first to pay the taxed bill of costs, a copy of which, with a receipt, must be taken by the master to file. His commissions, fees and disbursements are not included in the bill, but retained and specified in his report: secondly, the amount of principal and interest computed up to the time, is paid out of the proceeds, to the complainant or his solicitor, and a receipt also taken. If there be a deficiency, it is reported and collected as hereafter directed; if a surplus, paid into court. The object of the bill is accomplished by the decree for sale which is final, the sale, enrolment of decree, and payment. The complainant has no interest in the surplus, unless his debt is by instalment, and a decree covering future defaults is entered as hereafter mentioned. The surplus must be paid by the master into court pursuant to the statute, standing rule, and decretal order; and if not applied for in three months, invested.(25)

§ 20. Filing bill of costs; receipt; *report*; confirmation thereof; execution for residue, &c.

The master must also file the copy of the taxed bill and receipt for costs; [ch. 2. § 82.] the receipt also, for

(22) Deed. Bla. 321. Hoff. Mr. 391. No. 64. see ib. 220-2.
(23) 2 R. S. 192. § 158.
(24) See 4 J. Ch. 534. 370. 542. 1 Hopk. 88. 234. Hoff. Mr. 214.
(25) See 2 R. S. 192. § 159, 160. As to investment, &c. see ante ch. 1. § 12.

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the principal and interest, and with all convenient speed make his *report*,(26) embracing all the particulars directed by the decretal order of sale, including the fact, if so, of the insufficiency of the fund. The report being filed, the complainant enters an order which is of course *nisi*—a rule of eight days [see ch. 2. § 30. 53.] for confirmation, and obtains and delivers a certified copy of the order to the purchaser, for whose benefit the same was entered. Such order is necessary prior to proceedings to let the purchaser into possession; prior to an application for the surplus; and prior to, and must become absolute before execution for the residue, if a deficiency be reported.

§ 21. Execution for residue and other incidental proceedings.

There are certain incidental proceedings unessential to the connected view taken, which may arise, and will, therefore, be considered in connexion with the preceding subject, in the following order: 1. Where the proceeds of the sale are reported insufficient to pay the debt and costs: 2. Where the decree has been entered to secure the payment of future instalments: 3. Where the purchaser refuses to complete his purchase: 4. Where he complies with his purchase and is let into possession: 5. Where the surplus is claimed by defendants or other subsequent incumbrancers, or is vested for the benefit, and subsequently paid upon the petition of the defendant.

Execution.

1. In the first case, the court, on the coming in of the report of sale, have power to decree and direct the payment by the mortgagor, of any balance of the mortgage debt remaining unsatisfied after a sale of the premises, in the cases in which such balance is recoverable at law, and may issue the necessary executions as in other cases [see ch. 2. § 84.] against other property of the mortgagor, or against his person;(27) and where the bond or other evidence of debt, accompanying the mortgage, had been given by any other person than the mortgagor, and who had been made party to the bill, as directed by the statute, [ante ch. 6. § 8.] the court may

(26) See Hoff Mr. 220-1.—forms 390-1. appx. No. 62. Bla. 324.

(27) 2 R. S. 191. § 152. In the form of the order for sale appended to the Rules. (No. 14.) it is in the last place ordered, &c. that the master specify the deficiency in his report of sale, and on confirmation, &c. the defendant, &c. pay complainant the deficiency with interest, from the date of report, & that complainant have execution.

decree payment of such balance, after a sale, as well against such third person as the mortgagor, and enforce the decree as in other cases.(21)

§ 22. Instalments: paying in; or a decree to secure future defaults.

2. Where the bond and mortgage were for payment by instalment, and the decree is entered to secure future defaults: [ch. 2. § 8.] It is provided by statute,(22) and is accordant with prior decisions,(23) that before the decree for sale, the amount due and costs might be brought into court, when the bill for foreclosure was for one instalment where other instalments would fall due; and(24) that if brought in after such decree the proceedings should stay, but the court might enter a decree to cover any future default in payment of instalments; that (25) if defendant do not pay in, then, or in any case where the decree is for complainant, a reference shall be directed to ascertain what parcels can be sold, and the decree be entered to secure future defaults; that to enforce subsequent payments of pricipal or interest, by instalment, a sale might be ordered on petition as the statute directs,(26) and the proceedings would be by reference, report thereon, order for sale, and report,(27) the petition being first drawn and presented as directed; [ch. 2. § 5. &c.] that in any cases, if a sale of part be not advantageous, the sale of the whole may be decreed;(28) and that then, the whole debt and interest may be paid, or the surplus after payment of the instalment or interest claimed, may be invested for the benefit of the complainant, as the debt falls due, and all overplus for defendant.(29)

§ 23. Compelling purchaser to complete his purchase, &c.

3. The purchaser may on motion (founded on affidavit, certificate, report of master, &c. and due notice for a regular motion day as directed ch. 2. § 7-15.) be compelled to complete his purchase, and where there is no alternative conditions to the sale, may be compelled by attachment,(30) order to show cause; &c. [see ante § 6 ch. 2. § 84.] or on motion founded for instance on the

(21) 2 R. S. ib. § 154.
(22) 2 R. S. 192. § 161.
(23) vid. 4 J. Ch. 534-6. 7 J. Ch. 13. 1 Hopk. 119. 120. 121.
(24) R. S. ib. § 162. 4 J. Ch. 534.
(25) ib. § 163.
(26) ib. § 164.
(27) see petition reference and report thereon, and report on sale. Hoff Mr. 397-90. No. 60-62. also 214-16.
(28) ib. § 165.
(29) ib. § 166. see 4 J. Ch. 534.
(30) 2 J. Ch. 505. see Hoff. Mr. 233-6.

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insolvency of the purchaser, or inability to pay, he may be discharged on terms,(9) and in either case the property be re-advertised and sold; and in the former case where the purchaser is not compelled by attachment, or refuses to complete his purchase, a re-sale may be moved, and the purchaser attached to make up the deficit arising between the first and second sale.(10) In some instances also, the biddings may be opened, and a re-sale take place.(11) But if the property is not clear as represented, the purchaser may decline, until it is free,(12) and if there be doubt and difficulty as to the title, it will be referred to a master to examine and report.(13) So the purchaser may appropriate part of the purchase money to pay incumbrances upon special application founded on notice,(14) but without such special order the surplus must be brought into court to abide future order for distribution; and if a subsequent judgment purchaser is obliged to buy in under a prior mortgage, he stands in the place of the mortgagor, and takes the proceeds;(15) or if the mortgagee had been compelled to satisfy a prior judgment, he stands in the place of the judgment creditor pro tanto, and will be paid out of the proceeds.(16) So if the purchase was free of incumbrance, and a city assessment be discovered, the master may discharge it, by order of court, out of the proceeds.(17)

§ 24. Enforcing possession in favor of purchaser.

4. But where the purchaser complies with the terms of purchase, he will be assisted by the process of the court to possession. The authority of the court to enforce its decree by giving possession is incidental to proceedings *in rem*, and is confirmed by statute. [ante ch. 6. § 8.] By the rule before recited and the decree, in conformity with it, [ante § 17.] the purchaser is to be let into possession of the premises on production of the master's deed, and a certified copy of the order confirming the report of the sale, after the same has become absolute.(18)

(9) see Hoff. Mr. ib.
(10) see Hoff. Mr. 236-7. Form of decree ordering the bidder to pay the difference between the first & second sale, Hoff. Mr. 404. No. 81. Forms of attachment on not complying with the order. ib. 405. F. affidavit on service of attachment. ib. 406. No. 83.
(11) see Hoff. Mr. 223-6.
(12) 4 J. Ch. 542.
(13) 4 J. Ch. 659. see Hoff. Mr. 231-2.
(14) Hoff. Mr. 226-229.
(15) 1 Hopk. 88.
(16) 4 J. Ch. 37.
(17) ib. 542.
(18) R. 135. *ante* see forms, &c. Hoff. Mr. 237-240. 393-6.

The further proceedings are as before directed.[see ch. 2 § 84. and ante § 6.]

§ 25. Surplus; claimed by subsequent incumbrances, defendants or others; reference, decree and distribution. If not applied for, in three months to be invested, for defendant payable to him upon the order of the court.

5. On the coming in and confirmation of the master's report of the sale of mortgaged premises, if it shall appear there is any surplus moneys remaining in court after satisfying the amount due the complainant, any defendant, on filing an affidavit that such surplus has been paid into court, and that he is entitled to the same, or some part thereof, may have an order of course, referring it to a master to ascertain and report the amount due to such defendant, or to any other person, and which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon; to the end that on the coming in and confirmation of the report, such further order and decree may be made for the distribution of such surplus moneys as may be just; and every defendant who has appeared in the cause, and every person who has left a written notice of his claim to such surplus moneys, with the register, assistant register or clerk, where the same are deposited, shall be entitled to notice to attend the master on such reference. And any person making a claim to such surplus moneys, and who shall fail to establish his claim on the hearing before the master, may be charged with such costs as the other parties have been subjected to by reason of such claim; and the parties succeeding on such reference may be allowed such costs as the court may deem reasonable; but no costs unnecessarily incurred on such reference, or previous thereto, by any of the parties, shall be allowed on taxation or paid out of such surplus.(19) If the surplus or any part remain three months unapplied for, it will be put out at interest for defendant, his representatives or assigns, to be paid to them by the order of the court.(20)

DIVORCE.

§ 26. Pro confesso, in bills to annul or dissolve the marriage contract; and for separation or limited divorce. Proceedings on default, to reference; order of reference, how obtained.

The preliminary steps taken, bill filed, [ch. 6. § 19-21. ante § 1.] subpœna served, [ib. § 3.] injunction, ne exeat [ch. 6. § 23. &c.] receiver [ante § 7.] and order for allowance(1) for support and expenses pending the suit, applied for, as the occasion may require; the further pro-

(19) R. 136.
(20) 2 R. S. 192.

(1) 1 Paige 261.

CHAP. VII. ceedings until the bill be taken as confessed, are as before directed, [§ 8-12.] excepting, in the present cases no decree of nullity, divorce, or separation is of course by default, consent, or neglect to appear at a hearing.(2) The consent of counsel to a decree *a vinculo*, &c.(3) the consent of parties to a separation, *a mensa*, &c.(4) have been equally disregarded. In the former(5) as well as the latter,(6) a reference must be had to take proof. No sentence of nullity can be pronounced solely on the declarations or confessions of the parties, but the court must in all cases require other satisfactory evidence of the existence of the facts, on which the allegation of nullity is founded.(7) In any bill therefore to obtain a sentence of nullity, declaring void the marriage contract, a separation or limited divorce, or for divorce on the ground of adultery, the complainant may, if the bill be taken as confessed, apply on a regular motion day [ch. 2. § 15.] upon due proof of the regularity of the proceedings [ante § 1 3-14.] in taking the bill as confessed, for a reference to a master to take proof of all the material facts charged in the bill and to report the proof with his opinion thereon.(8) But to obtain such order if the bill seek to annul a marriage on the ground that it was irregularly solemnized, an affidavit must be produced, showing that the marriage has not been consummated; if to annul the marriage on the ground that the party was under the age of legal consent, an affidavit must be produced showing that the parties thereto have not freely cohabited for any time, as husband and wife, after the complainant had obtained the age of consent. And if the bill seeks a divorce on the ground of adultery, the complainant must show by affidavit, that the adultery charged in the bill was committed without the consent, connivance, privity or procurement of the complainant; that the bill was filed within five years after the discovery of the offence charged, and that the complainant has not voluntarily coha-

(2) R. 170. As to effect of a default by former decisions. see 1 Hopk. 118. 1 J. Ch. 606. 2 J. Ch. 224.
(3) 1 J. Ch. 488.
(4) 4 J. Ch. 501. 1 Hopk. 118.
(5) 2 R. S. 145. § 41. R. 170. 1 J. Ch. 197.
(6) R 170. 166. 163-4. 1 Paige 276. see. authorities *ante* ch. 6. § 21.
(7) 2 R. S. 144. § 36. R. 170.
(8) R. 164. 2 R. S. ib. 1 J. Ch. 197. 1 Paige 276.

bited with the defendant with knowledge of the adultery charged in the bill.(9)

§ 27. Reference to hearing.

The order being obtained, entered and served, the master proceeds(10) as directed. [ante § 13 and ch. 2. § 36. &c.] On a reference to take proof of the facts charged in a bill for a separation or limited divorce, he may take the examination of the complainant on oath as to any cruel or inhuman treatment alleged in the bill which took place when no witnesses were present, who are competent to testify to the facts on such reference.(11) On a bill by the husband for divorce, in which the illegitimacy of any of his wife's children are stated in the bill, [ch. 6. § 20.] if a reference be ordered the master must take proofs and report his opinion on the question of legitimacy as well as upon the other matters stated in the bill.(12) The proofs taken and report made, the further proceedings until hearing are as directed. [ante § .] But as no sentence or decree as before stated, can be by default, consent or neglect, every such cause must be heard upon the coming in of the master's report, at a stated term; but where no person appears on the part of defendant, the details of evidence in adultery causes will not be read in public, but submitted to the chancellor or vice-chancellor in open court.(13) The cause is noticed, placed on the calendar, and brought to hearing as directed. [ante § 14.]

§ 28. Decree; further decree as to costs, custody alimony, &c. sequestration, appointment of receiver.

The final decree(14) for a divorce a vinculo, &c. dissolves the marriage contract.(15) The sentence of nullity declares the contract void.(16) The decree for divorce a mensa et thoro, may be a separation forever or for a limited time.(17) A final decree in the first case is not of course though adultery be proved. It has been decided that subsequent cohabitation with scienter, lapse of time or long acquiescence was a bar to a decree, and the bill, though counsel consented to a decree, was dismissed with costs.(18) The cases in which a divorce may be denied though adultery be established are prescibed

(9) R. 165.
(10) see Hoff. Mr. 170. 174. 1 J. Ch. 197. 606. 488.
(11) R. 166.
(12) R. 168. see R. S. 145. § 43, 44.
(13) R. 170.
(14) see Bla. 372.
(15) 2 R. S. 144. § 38.
(16) ib. 142. § 20.
(17) ib. 146. § 50.
(18) 1 J. Ch. 488.

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by statute.(19) [ante ch. 6. §20.] In divorce from bed and board the course under the former statute was to decree it perpetual, with proviso that the parties might by mutual and voluntary act, apply for a discharge from the decree.(20) The decree for separation may also, by the revised statutes, be revoked on joint application, and satisfactory evidence of reconciliation.(21) In divorce or separation the court may require the husband to pay any sums necessary to carry on a suit brought by the wife, decree costs against either, and award execution for the same, or direct the costs to be paid out of any property sequestered, or in the power of the court, or hands of a receiver.(22) The court has the same power to award costs and enforce decrees in sentence of nullity.(23) Under a former statute authorising such other decree as the case required, the custody of the child with the mother, their maintenance, and costs were decreed.(24) In either of the preceding cases, the nature and effect(25) of the decrees, and collateral provisions for the custody, care and education of the children,(26) maintenance for them, or allowance for the wife,(27) are regulated by the revised statutes.(28) If the court in decreeing the divorce make such further order, a reference(29) will be directed to fix the amount of alimony, and maintenance. And when the court shall make the order or decree for the maintenance of the children, or for allowance to the wife, the husband may be required to give reasonable security therefor; upon neglect or refusal to give such security, or upon default of him and his surety, to provide such maintenance and allowance, the court may sequester his personal, and rents and profits of his real estate, and appoint a receiver thereof, and cause the same to be applied towards such maintenance and allowance as to the court shall, from time to time, seem just and reasonable.(30) The mode of sequestration is noticed

(19) 2 R. S. 145..
(20) 4 J. Ch. 187.
(21) 2 R. S. 147. § 56.
(22) ib. 148. § 58. see 1 Paige 261.
(23) ib. 144. § 35.
(24) 4 J. Ch. 187. 197.
(25) 2 R. S. 139. § 4. 141-2. 145-6. § 43. 46-9.
(26) ib. 143. § 32. 148. § 59. 2 J. Ch. 143.
(27) ib. 143. § 32. 145. § 45. 147. § 54-5. As to alimony, see 6 J. Ch. 91, 92. 1 Paige 274. 1 J. 424. 2 Kent's Com. 83. 91. 106. 108. 116, 117.
(28) ib. see also, 1 Paige 83. 1 Hopk. 584. 100.
(29) see proceedings. Hoff. Mr. 167-9. 175-6. and appx. No. 54. 55. see 6 J. Ch. 91, 92.
(30) 2 R. S. 148. § 60. see 6 J. Ch. 182. 178. 92.

under the next subdivision of this chapter in proceedings against absent, concealed or non-resident defendants, [§ 31, &c.] and under the third subdivision of the chapter to compel appearance or answer. The proceedings for the appointment of receiver have been already stated. [ante § 7.]

§ 30. Pro confesso; for non-appearance on personal service in other cases; bill to redeem; specific performance.

Other cases have been alluded to [ante § 13.] where references may be directed before the cause be set down for final decree. Thus on a *bill to redeem*, a reference to compute, allow annual rests, &c. in certain cases, precedes the decree,(1) which usually allows six months (though the time may be shortened) to redeem from the time of the report, and if complainant fail to redeem, his bill will be dismissed and his equity consequently barred ;(2) and unless dismissed with direction to be so without prejudice, it may be plead in bar to a new bill.(3) Costs are not invariably paid by the party seeking to redeem.(4) In suits for *specific performance*, not by the purchaser against the vendor to compel completion of the purchase, but by the vendor against the purchaser, the contract being admitted [see ante § 13.] the court on special motion before answer, has directed a reference to enquire whether a good title can be made. The reference may also be whether the abstract shows a good title, and [with a view to costs, ante ch. 2. § 80.] the order may direct the master to enquire when a good title was shown, whether before or after bill filed.(5)

2. PERSONAL SERVICE OR PUBLICATION.

§ 31. Pro confesso upon non-appearance on personal service, or publication of special order to appear, the defendant being non-resident, absent or concealed.

The proceedings to the filing of the bill and taking out process have been directed. [ch. 6. § 1, &c. ante § 1, &c.] The subpœna may be served in case of absence, on defendant's wife, servant, or member of his family, at his place of abode. [ante § 3.] But it does not follow that upon such service merely, a decree can be taken by

(1) See Bla. 226. Hoff. Mr. 241, 242-3-251. 83-90. 355-8. No. 28. Eq. Draft. 648. see Hoff. Mr. ib. Eq. Draft. 645.
(2) 18. J. 561. 4 J. Ch. 140.
(3) 4 J. Ch. 140.
(4) 1 Paige 48-47.
(5) Grant 16. Newl. 147-8. & authorities cited. see 1 Ves. and B. 224. 351. 2 ib. 103. 378. 1 Meriv. 19. 138. 373. 2 ib. 424. 3 Madd. 279. 1 ib. 211. see 6 Cowen 18 22.

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default. The complainant may proceed as directed in the next subdivision of the chapter, or if the case warrant it, proceed as now directed. The court will upon *special application*,(1) grant an *order*:(2) 1. When defendant is a resident of the state, upon proof by *affidavit*(3) that process for his appearance has been duly issued, and that the same could not be served, by reason of his absence from or concealment within the state, or by reason of his continued absence from the place of his residence, *that he appear and answer the bill within three months from the date of the order:* 2. When defendant resides out of the state, upon proof by affidavit of that fact, 1. When a resident of another state or territory of the United States, or of either province of Canada, *that he appear and answer within four months*; and 2. If a resident of any other state or country, *within nine months* from the date of the order.(4)

§ 32. Affidavit and special order, publishing or serving same.

The affidavit above required, on which the special application is founded, being prepared [ch. 2. § 7.] and presented ex parte on a regular motion day, [ib. § 29. 13-15.] an order(5) will be granted that defendant appear and answer within the prescribed time, that a copy of the order be published in the papers designated in the order and for the time required, (or personally served as presently mentioned) and in default of appearance that the bill be taken as confessed. The affidavit is filed and the order entered in the proper office, [ch. 2. § 28. 33-34.] and a certified copy for publication or for personal service, obtained. The order must be published within twenty days after made, in the state paper and such other paper in the state, as the court direct, for 8 successive weeks, at least once a week; but *publication* will not be necessary, in any case in which a copy of such order shall have been served on such absent, concealed, or non resident defendant, *personally*, at least *twenty days before the time prescribed* for his appearance(6) The

(1) R. 25.
(2) vid. Bla. 92. 90. Eq. Draft. 598.
(3) vid. Bla. 91. affidavit of due diligence between test and return of subpœna, to find out defendant.
(4) 2 R. S. 186. § 122-3.
(5) R. 25. vid. Bla. 91-2. ante ch. 2. § 32.
(6) ib. § 124. R. 25. see ante § 3.

chancellor may if necessary, extend the time of appearance by further order, and direct the publication thereof for so long a time as he may fix.(7).

§ 33. Pro confesso; affidavit of publication or personal service; order of course, pro confesso and for reference; reference and report.

If the defendant do not appear within the time limited in the order, the complainant upon due proof of *publication or of personal service*, may take his bill as confessed, and the court will direct a reference to take proof of the facts and circumstances stated in the bill.(8) On filing in the proper office an *affidavit*(9) of the printers with copy of order annexed, [ante § 17.] as proof of publication, or an affidavit of personal service, which if taken abroad, must be duly authenticated [see ch. 2. § 7. n.] with affidavit that defendant has not appeared;(10) an *order* to take the bill as confessed,(11) and for reference under the statute, may be entered of course.(12) On the reference [ante § 13-14.] the master [ch. 2. § 36-37.] must take such proof as may be offered. The bill cannot be considered evidence of any fact stated, but when directed by the chancellor, upon a like special application,(13) the master may receive the testimony of the complainant as evidence.(14) If the bill be for payment or satisfaction of money, the court will direct that the complainant be examined by the master as to any payment made on account of the demand claimed, and which ought to be credited thereon.(15) The reference in other respects is as usual. [ante § 14.] The master must report the proofs and examinations had.(16)

§ 34. Hearing and decree; sequestration; decree remains open for one year after notice or seven years without.

The cause may be set down for hearing as directed, [ante § 14-16.] and on the coming in of the report, the chancellor will make such order thereupon as shall be just.(17) The decree being prepared and entered, [ch. 2. § 27-34. ante § 15.] costs taxed, &c. [ch. 2. § 80-3. ante § .] process [ib. § 83, 84.] may then issue to compel performance thereof by *sequestration*(18) of the real and personal estate, or a sufficient part; or where any specific estate or effects are demanded

(7) ib. § 125.
(8) ib. § 126.
(9) vid. Bla. 93.
(10) R. 25.
(11) vid. Bla. 76. 93. 90. 4 J. Ch. 202.
(12) R. 25.
(13) R. 25.
(14) R. S. ib. § 127.
(15) ib. § 128.
(16) ib. § 129.
(17) ib.
(18) *Sequestration*. see Bla. 88.9. 103. 97, 98. 24 appx. Bac. Abr "seques." Newl. Pr. 82. 285 vid. 4 J. Ch. 202.

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by the bill, by causing possession thereof to be delivered to the complainant,(19) on his first giving such security in such sum as the court direct to abide its order, touching the restitution of the estate or effects delivered, in case defendant appear and be admitted to defend.(20) Upon like security given, the court, when a sequestration shall have issued, may order the decree to be satisfied out of the estate and effects sequestered, which, if security be not given, will remain under the direction of the court to abide its further order.(21) If the complainant wish to obtain a confirmation of the decree, one year being allowed defendant, or his representatives to appear after notice, [see post ch. viii.] he must cause notice of the decree to be given to him, otherwise it will remain open for seven years. When the time thus limited for appearance has expired, the court will, by order, confirm the decree against the defendant and all claiming under him by any act subsequent to the commencement of the suit, and make such further order in the premises as shall be just and reasonable.(22)

§ 35. Foreclosure in case of such publication or personal service.

If the bill be for foreclosure or satisfaction of a mortgage (the proceedings in which, modified as above by the fact of defendant's being a non-resident, concealed or absent, have already appeared, [ante §16, 17, &c.] the court instead of sequestration as above directed, may decree a sale of the mortgaged premises, or such part as will discharge the mortgage with costs, as in other cases,(23) and the proceedings thereupon will be as directed on pro confesso for non-appearance on personal service of subpœna, [*ante* ib.] and if defendant before such sale appear and pay complainant such costs as the court award, the sale will be stayed, and proceedings thereafter had as if defendant had been served with process, and had regularly appeared.(24) But no sale and conveyance regularly made under the preceding provisions, will be effected by the defendant's appearance within the year or seven years limited, nor by any other proceeding; but the defendant or his representatives may, within seven years after the decree ordering such sale, file a bill against the complainant or his represen-

(19) R. S. ib. § 130.
(20) ib § 131.
(21) ib. § 132.
(22) ib. § 134, 135.
(23) R. S. ib. § 136.
(24) ib. § 137. ante § and post ch. viii.

tatives to account for all moneys received by them by virtue of such decree, over and above the amount justly due on the mortgage and costs of suit; and the court will proceed upon such bill according to the equity of the case.(25)

3. UPON SERVICE NOT PERSONAL.

§ 36. Pro confesso upon non-appearance on service of subpœna not personal, and proceedings to compel appearance.

The course of proceeding on personal service of subpœna, or of special order to appear, or publication of such order has been pointed out. If the subpœna itself should be served abroad, it seems that it might sustain an attachment,(26) [ante § 3.] and consequently a proceeding to take the bill as confessed, in the mode presently directed. The court also might, on special application, order a substituted or special service in certain cases, [ante § 3.] and by the standing rule of court, a subpœna may, in case of defendant's absence, be served on his wife, servant, or member of his family, at his place of abode. [ib.] But in this case, if defendant do not appear, the complainant may proceed to bring him within the class of absent, concealed or non-resident defendants, by proper exertion to effect personal service, or proceed upon non-appearance on such substituted service (as well as where it was personal, if complainant wish to compel appearance) by process of contempt, and in case of non-appearance thereon, to take his bill as confessed. An *attachment* is the first process of contempt to enforce appearance in ordinary cases. [see ante § 5, 6. ch. 2. § 8.]

§ 37. Attachment, pro confesso, &c.

An affidavit(1) of service on the defendant, his wife, servant, or member of his family at his place of abode, as the case may be, is filed, and an *order* of course(2) entered for *attachment*.(3) The sheriff will take a bond for appearance in $100 only, unless the chancellor or a vice-chancellor having jurisdiction, upon application and due proof for this purpose, direct and endorse the amount to hold to bail.(4) Attachments for not appearing or not answering, or other bailable contempts, must be made returnable on a regular motion day, or some day in term, unless otherwise specially ordered by the court.

(25) ib. § 138. vid. 1 Hopk. 120.
(26) 1 Simons 389.
(1) 1 vid. Bla. 82. 99. ante ch. 2. § 7.
(2) vid. 2 R. S. 534-6. Bla. 83. 100. 2 J. Ch. 226.
(3) Form. Rules of Ct. appx. No. 2. vid. Bla. 83. 100. 4 J. Ch. 57.
(4) 2 R. S. 536-7.

CHAP. VII. And all the defendants in a suit residing in the same county, liable to attachment for the same, or a like contempt, must be named in one writ.(4) It is sealed, signed by the register, &c. solicitor, or party in person, [ch. 6. § 30.] and endorsed by the chancellor or a vice-chancellor, by whom the order is made: "Let the defendant give security for his appearance in the sum of —."(5) If an attachment for not appearing or not answering is served, and the defendant gives security for his appearance at the return day of the attachment, as required by law, if he do not comply with the condition of the bond, the same shall become forfeited, and the complainant may prosecute the bond, and have a special order that the defendant's appearance be entered by the proper officer, or that the complainant's bill be taken as confessed, as the case may be; or he may take out an alias attachment, If the defendant make default a second time, the complainant may have a pluries attachment which shall not be bailable.(6) The writ is delivered to the sheriff, and if served the defendant is kept in custody until the return day, unless he give a *bond*(7) with sureties for his appearance in the sum required. The sheriff is amenable for the due execution and return of process [ch.1. § 14.] and if he neglect to return the attachment or bring in the body, an attachment may be issued against him.(8) If the defendant be in custody on execution or process for other contempts(9) the complainant may obtain an order(10) for a *habeas corpus*(11) directed to the officer to bring up defendant to the bar of the court. When a defendant brought into court by writ of *habeas corpus* or other process, neglects or refuses to enter his appearance, according to the rules of the court, the court will order his appearance to be entered; and the suit will then proceed, as if the party had actually appeared.(12) If the defendant appears personally, or is brought into court by the sheriff, on the return of an attachment for not appearing or not answering, he must enter his appearance or put in his answer, and pay the costs incurred by his contempt, instanter, or within such time as the court shall

(4) R. 26.
(5) Rules, appx. No. 2. vid. 4 J. Ch. 57. 2 R. S. 535-6
(6) R. 27. 2 R. S. 537. 539.
(7) 2 R. S. 536-7. 540. § 36-7. Bla. 86.
(8) 2 R. S. 536–7-8.
(9) ib. 536.
(10) Bla. 55 appx. Eq. Draft. 598 601. 614-15.
(11) 19 Bla. 85. 2 R. S. 536.
(12) 2 R. S. 179. § 73.

then appoint, or be committed until he complies. Or the complainant may have an order that the bill be taken as confessed, and that the defendant be committed until the costs are paid ;(1)

§ 38. Attachment and further process of contempt to sequestration, pro confesso, &c. distringas instead of attachment against corporation.

The complainant, it has been shown, may have the appearance entered and take his bill as confessed: 1. When defendant gives bail and neglects to comply with the condition of his bond: 2. When brought up and refuses to enter his appearance; or in the first case may issue an alias attachment; and if also returned non est, a pluries attachment not bailable. If on this the defendant be arrested, he is kept in close custody and brought up as before, and the like proceedings may be had. But if the pluries be returned non est, the plaintiff *may*, but seldom does, thereupon proceed by the old process of an *attachment with proclamation*,(2) and if returned non est, a *commission of rebellion*,(3) issued to four commissioners commanding them to attach the defendant, if in the state, as a rebel and contemner of its laws and government. If returned *cepimus corpus*,(4) a *habeas corpus* as before mentioned may issue to bring him in, and the court thereupon by the statute before recited may order the appearance entered, and the suit to proceed as if defendant had actually appeared. But if the commission of rebellion be returned non est, the court on motion may send a *sergeant-at-arms* with an *order* to search for, and arrest. If he return non est, a *sequestration*(5) on motion is directed to four or more commissioners to take and keep possession of the personal estate and profits of the real, to satisfy the plaintiff and abide order of court.(6) The sequestration is served by two of the commissioners on the tenants (aided by sheriff by *writ of assistance*,(7) if they are forcibly obstructed;) an order is then procured for tenants to attorn to the commissioners, who are amenable to the court for the rents and profits, and after order for sequestration, an order is taken *pro confesso* to the bill, a decree obtained, and the sequestrators then proceed to appropriate the estate under the direction of

(1) R. 28. see 2 R. S. 538.
(2) Bla. 100. 96. 1 Grant. 36. 141. 131-8.
(3) ib. 101. c. Bart. 83. Gilb. 77. Grant. 131.
(4) Grant, 135-7.
(5) Bla. 103. see ante § . Grant. 133. Newl. 82.
(6) Bla. 97.
(7) Bla. 24. appx. see form Rules, appx. No. 1. ante. ch. 2. § 84.

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the court to payment of complainant.(6) This process may, with the other processes mentioned, be discharged upon defendant clearing his contempt and paying costs. If the bill be taken *pro confesso ad computandum*, the court in England would not discharge the sequestration on paying costs of contempt only, but will keep it on foot, only as a security to the plaintiff for defendant's appearing before the master to take the account.(7) This process, issuing as mesne process, is said to abate on the death of the party in contempt, it being considered as personal process only. But it revives on revival of the suit. [see post.] If defendants be a corporation, the proceeding on return of subpœna, affidavit of service, &c. is, instead of an attachment, a distringas directed to make distress upon their lands and chattels. An alias and pluries might issue, and lastly an order for sequestration as in other cases, except that when awarded against corporations they could not stay it on entering appearance; and thereupon complainant's bill might be taken pro confesso.(8) A distringas is also the process to compel appearance on return of summons served, upon an indictment at law against any corporation,(9) or to collect a fine imposed. A sequestration is a final process on return of execution unsatisfied on a decree against corporation. [ante ch. 5. § 24.]

§ 39. Process to compel appearance for the sake of an answer; mode of entering appearance.

If in the preceding cases, the bill be taken as confessed, the complainant will proceed as herein before directed, to a final decree and satisfaction, [ante § 12-15. either by execution in ordinary cases, or by sequestration as last mentioned. [see also, ante § 28.] But if the complainant proceed by process of contempt to compel appearance for the purpose of answer, as noticed in the next subdivision of this chapter, the defendant will be committed until he enter his appearance, and put in his answer instanter, or within such further time as the court may then appoint. [ante § 37.] The mode of entering appearance has been usually by delivering to the proper officer [ch. 2. § 33.] a precipe containing the title of the suit, and a direction to the officer to enter the common order for appearance.(10) But a draft order, written re-

(6) Bla. 98. and auths. cited. Bac. Abr. Sequest.
(7) Newl. Pr. 86. 3 Atk. 468. sed. vide 1 Jacob. 49. *post.*
(8) Vid. Bla. 76. 97. 104. and n. 2 Vern. 395.
(9) 2 R. S. 747. § 35-7.
(10) Bla. 72, 73. 103.

quest, or any authority for the officer is sufficient. [ch. 6. § 34.] The voluntary appearance of defendant without process of contempt, and the proceedings to take the bill as confessed for want of answer or to compel answer, will be mentioned in the next subdivision.

§ 40. The mode of obtaining the appearance of infants, &c. guardian ad litem for them and others, on petition of complainant.

In case of persons legally disqualified to appear in person or by solicitor, [ante ch. 3. § 1. ch. 4. § 1.] the mode of obtaining an appearance is not by process of contempt, though cases formerly occurred of attachment and messenger against infants for the purpose of having a guardian assigned. But in such cases, the complainant having proceeded as directed: [ch. 5. § 30. ante § 3. 9-12.] if an infant defendant, or some disinterested relative or friend in his behalf, do not procure the appointment of a guardian ad litem within twenty days after the expiration of the usual time for appearance, as prescribed by the rules of the court, the adverse party may apply to the court to appoint a suitable person as the guardian for the infant; and such party, in his petition, must briefly state the age and residence of such infant, the general object of the suit or proceeding, and the nature of the infant's interest therein.(10) The petition, consent of guardian, (unless the court assign one of its officers pursuant to the standing rule mentioned in the next chapter) the order and other proceedings may be similar to those where the application is made by or in behalf of an infant defendant, [post ch. viii.] excepting that in the present case the application is special, and must be made at the time and in the mode usual in such cases. [see ch. 2. § 5, &c. 15, &c.] In other cases where defendant is deaf and dumb,(11) superannuated,(12) or otherwise incapable of defending the suit; or in case of idiots, lunatics, non compos, &c. where no committee has been appointed, [see ch. 4. § 8, &c.] the complainant, from the necessity of the case, may apply for appointment of guardian ad litem to appear and answer for them. If a committee has been appointed he is the proper party (ch. 3. § 18.) or person to appear and defend. In case of an idiot or lunatic defendant, and the bill stating it, the committee will, on his

(10) R. 144. see R. 145-6. post ch. viii.

(11) 4 J. Ch. 168.

(12) 2 J. Ch. 232.

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petition or motion, be appointed of course. But if the bill do not state the fact, if no acting committee, or he is interested, or refuse, the plaintiff on special motion or petition on affidavit of the lunacy may, by the English practice, obtain an order for a commission to appoint a guardian to defend the suit.(13)

4. UPON NO ANSWER AFTER APPEARANCE.

§ 41. Upon no answer after appearance; proceedings to compel answer; and other steps prior to and in anticipation of defendant's defence.

The proceedings thus far conducted on behalf of the complainant will be so continued until the next chapter, where the defendant will make his appearance for the purposes of defence, and the suit be conducted to a final decree upon bill and answer. The course of proceeding under the present subdivision, will be: 1. Where the defendant having been compelled to appear as before noticed, or voluntarily appears, but not for defence, the complainant proceeds to take his bill as confessed, for want of answer in the ordinary manner, or, 2. after process of contempt, to compel answer; and also proceeds to take certain further steps in anticipation of the answer; by motion or petition, for injunction, &c. amendment, supplement, revivor, commission to take testimony de bene esse, &c.

§ 42. Pro confesso upon appearance, for want of answer, in the ordinary manner: 1. appearance; order of course to answer.

The defendant in person, or by solicitor, [ch. 3. § 1. 2.] guardian ad litem or committee [ante § 40. post ch. 8.] causes the common order for appearance as directed [ib. 39. & ch. 2. § 33. 34.] to be entered by the register or assistant register, if the cause be before the chancellor; or clerk of the circuit, or register or assistant register acting as such clerk of the third and first circuits, where the cause is before a vice-chancellor.(1) A notice of such appearance is served on the complainant prosecuting in person, or solicitor or his agent as directed. [ante ch. 2. § 13.] Such notice, without formal entry of appearance would be sufficient for the complainant or his solicitor, and an appearance may be effected without formal notice. [ante § 11.] Thus, where the defendant put in an answer which was read in court by the consent

(13) 1 Grant 141. c. Fowl. 478. Dick. 460. 5 Madd. 423. See Eq. Draft. 603. 606.

(1) see R. G. C. ch. 2 § 33-4.

of plaintiff's counsel, and ordered to be filed, it was an appearance on the records of the court;(2) or where the complainant's solicitor, at the request of the defendant's solicitor, sent him a copy of the bill, and requested that an answer might be put in, it amounted to an appearance, or a waiver of its formal entry, and the defendant was therefore to be considered as in court, and entitled to be served with a rule to answer, before the bill could be taken pro confesso.(3) Where defendant has appeared, and the plaintiff proceeds to compel answer, he need not have entered an order for defendant's appearance.(4)

§ 43. Order of course that defendant answer; & if bill be for discovery, that he answer, or an attachment issue; mutual services after appearance necessary;—service of bill and notice; order pro confesso, &c.

But if the complainant has received notice of the defendant's appearance, he may have an order of course that he put in his answer in forty days after service of a copy of the bill and notice of the order, or that the bill be taken as confessed. Where a discovery is necessary, on filing an affidavit thereof, the order may be varied so as to require the defendant to answer in like manner, or that an attachment issue; and in either case, if the defendant do not file his answer, and serve a copy thereof, within the time prescribed in such order, or such further time as may be allowed him for that purpose, the complainant, on filing an affidavit showing the defendant's default, may have an order to take the bill as confessed, or that an attachment issue, as the original order may be.(5) It is a general provision of law that when the appearance of a defendant shall have been entered according to the practice of the court, it shall be the duty of the complainant to serve on the party so appearing, copies of the pleadings and proceedings at any time filed in the cause on the part of the complainant.(6) It shall in like manner be the duty of defendant after appearance to serve on the complainant copies of all pleadings and proceedings so filed on the part of such defendant;(7) and if the complainant or defendant appear by a solicitor the service of pleadings and proceedings shall be made on or by such solicitor.(8) If the defendant appeared in person or by solicitor, copy of the bill with notice indorsed, of the order to answer, is served as before directed; [ch. 2. § 13.] if on the agent of solicitor, or if no agent,

(2) 4 J. Ch. 94. vid. 10 J. 524. Eq. Draft. 620.
(3) 4 J. Ch. 365.
(4) 1 Hopk. 416.
(5) R. 24. see the obsolete practice, Bla. 76-80. 3 J. Ch. 524.
(6) 2 R. S. 179. § 75.
(7) ib. 180. § 76.
(8) ib. § 77.

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by affixing, then 80 days or double time would be requisite, [ib] before the default could be entered, or, in the specific case, the attachment issue. At the expiration of this time, or further time if allowed, if no answer be received the complainant on an affidavit of service and of the default, may draw an order, which is of course for taking the bill as confessed for want of answer; attend the register, assistant register or clerk, file the affidavit, cause the order to be entered, and thereupon proceed as heretofore directed [ante § 12. to 15.] to final decree and execution; with this precaution that the defendant having appeared, will be entitled to services of further proceedings, as before mentioned.

§ 44. Process to compel answer, pro confesso thereon, an other proceedings.

But the complainant may not attain the object of his bill by a pro confesso, as where he seeks discovery; and may therefore in such case, or in any other if he pleases, proceed: 2. To compel answer by attachment, which in the specific case of discovery, may issue as before pointed out. In other cases he will apply for an order which is of course on affidavit as before directed, [ante § 37.] and proceed to compel an answer by attachment and other process of contempt, take the bill pro confesso, or proceed to sequestraiion, or by distringas and sequestration against corporations, as described in the same proceedings to compel appearance.(1) [§ 38-9. *post* ch. 8. § 7] If the defendant will not answer, and a decree pro confesso would be unavailing, as in case of discovery, the complainant has no further remedy. The defendant will be committed until he answer; but though he may be kept in prison, suffer a decree pro confesso, and his property to be sequestered, yet there is no power to compel him to disclose on oath; and where such discovery is the object of the bill, the complainant is remediless, and might if he please discontinue his suit. An order for the voluntary dismissal of a complainant's bill may be entered of course pursuant to the practice and on the terms [ch. 2. § 80.] prescribed in

Discontinuance of suit.

(1) vid. Bla. 42, 43. appx. 106. appx. vid. Eq. Draft. 573-4. 578. 598-9. 600-1 606. 586. 592. 594-5. 598. 645-6. so on distringas ib. 595 6. 598 601. 614-16. 620. Under a decree to acount made upon taking the bill pro confesso against a defendant, who has appeared but not answered, he cannot attend the master without the leave of the court; but leave may be given and the sequestration discharged on payment of the costs of contempt and of the suit. 1. Jacob 49.

such cases.(2) [see ch. 2. § 23. and § 14. n.] The complainant having voluntarily dismissed his suit, is not allowed to reinstate it, if the dismissal has not been procured by fraud.(3)

§ 45. Further proceedings by complainant before defendant answers.

But if defendant answer, he will do so in the manner pointed out in the next chapter, previously to which the, complainant in anticipation of the defence may deem it expedient to apply by motion or petition: 1. for injunction ne exeat or receiver; 2. for amendment of bill; 3. for leave to file a supplemental bill, or 4. bill of revivor; 5. by motion or petition, for revival on suggestion of the death of a party; 6. by bill of revivor and supplement; 7. give notice on death of a solicitor for new appointment; 8. petition for commission to take testimony.

§ 46. 1. Injunction; ne exeat; receiver.

1. Where no preliminary injunction or writ of ne exeat or appointment of receiver had been granted, complainant may, if there be any urgent necessity for the same before answer,(4) by petition or motion, or upon filing a supplemental bill, apply for the same [see ch. 6. § 23.] the defendant being now entitled to services of copies and notices, unless the same be excused by the urgency of the case; [ch. 2. § 10-13.] and except also where the application is for a ne exeat. This writ may be granted on motion without notice after appearance of defendant, as a notice might frustrate the object of the application.(5)

§ 47. 2. Amendment of bill.

2. The bill may be amended of course, without cost before answer. But amendment of a bill sworn to, is upon special leave of court after notice to the opposite party, and no amendment will be considered made until service thereof, if service of the pleading amended was necessary.(6) A rule must be entered,(7) the amendments marked and distinguished so as to be distinctly seen by defendant, and not blended with, or repeating the original bill(8) and served. By the English practice the original bill is interlined where the amendments are not so considerable as to blot and deface the record; other-

(2) 2 R. S. 613. 1 Paige 2 J. Ch. 475. Eq. Draft 583 582.
(3) 1 Hopk. 272.
(4) see R. 30. and 34. *post*, see also Eq. Draft 609. 616.
(5) 1 Jacob 545.
(6) R. 43. vid. 1 J. Ch. 434. As to amendment on death of a complainant see *post* §
(7) 4 J. Ch. 170. Eq. Draft. 576.
(8) 4 J. Ch. 170. see Hoff. Mr. 323.

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wise a new engrossment of the bill is made. The amendments are incorporated with, or the engrossment annexed to the original bill, forming but one record.(1) New subpœnas are unnecessary, except for new parties,(2) unless, it is said, there be a new engrossment of the bill,(3) after a full answer had been put in; for in such case according to the settled practice in England no further answer could be compelled by attachment without taking out new subpœnas.(4) In such case the full time to answer is allowed after amendment.(5) Amendments allowed are for some defect as to parties, omission of facts existing prior to the bill, or mistake of a fact or circumstance connected, but not forming the substance itself, or for some defect in the prayer for relief.(1) If the defect be as to parties, the amendment may be by making some of the plaintiffs defendants,(2) or by striking out the name of a defendant; but this cannot be done on motion of co-defendant without the consent of the defendant, or notice of the application;(3) or on motion of a co-plaintiff for leave to strike his own name out, because it was inserted without his knowledge or consent.(4) After one amendment, a re-amendment is sometimes allowable.(5)

§ 48. 3. But if no amendment, then, a *sup. plemental* bill may be filed; new subps. &c. If supplement is insufficient, what next?

3. But if no amendment can be made,(6) if the facts did not exist prior, but have arisen since the filing of the original bill,(7) as where defendaut has since brought an ejectment, and complainant wishes to obtain an injunction,(8) further discovery, put new matter in issue and add parties where the bill cannot be amended for the purpose(9) or full justice obtained without,(10) then, the proper course is to file a *supplemental bill*(11) [ante ch. 6. § 2. &c. If new parties be added, new subpœnas issue; if

(1) see Newl. Pr. 192. 197. 13 Ves. 86. 2 Atk. 119. It has been held however, that where a bill has been amended, the amended bill is the only one upon record. The original bill therefore cannot be read as evidence to prove what a plaintiff considered his right to be at the time of filing it. Daniell's Rep. 141.
(2) 3 J. Ch. 410.
(3) 2 Madd. 287. c. Bla. 210.
(4) Newl. Pr. 197. n. (e)
(5) 3 J. Ch. 410.
(1) 1 J. Ch. 184. 1 Paige 168.
(2) vid. Eq. Draft. 577. 611.
(3) 4 J. Ch. 94.
(4) 5 J. Ch. 259.
(5) 6 J. Ch. 79. vid. 1 Grant.
(6) 4 J. Ch. 363. 3 J. Ch. 423.
(7) 1 Paige 168. vid. 2 Madd. 234. Mit. Pl. 69. sed. 4 J. Ch. 549. 605.
(8) Eq. Draft. 334. sed vid. ante § R. 30.
(9) Willis 326. or for delivery of deeds, &c Bla. 78. appx.
(10) vid. Bla. 24-5. 40-1. citing 1 Harr. 123. Bart. 152-3.
(11) ib. Bla. appx. 78. and see 4 J. Ch. 35. 549. 605. Eq. Draft. 333. 335, 339. Willis 326.

defendants do not appear, proceedings are as before directed; if they do, the bill is served by copy and notice to answer as usual.

§ 49.
4. Revivor by bill on abatement by death or marriage.

4. But if amendment or supplement is inapplicable, as on abatement by death or marriage, where *one* of several defendants dies, or where a female plaintiff has married since the bill filed, a *bill of revivor* [ante § 2.] should be brought in the first case against the personal representatives of the deceased(12) and in the second, by the husband, to continue by bill of revivor, the suit thus abated by marriage.(13) Previously to the statute which will be presently recited, it was necessary, in case of abatement by death, to file the bill against the representatives of a deceased party, as where a sole defendant died before putting in his answer,(14) an heir at law of mortgagor deceased, entitled to an equity of redemption,(15) or by heirs, devisees, executors or administrators, to revive the suit *abated* by death.(16)

§ 50.
5. Or by petition or motion, on death of a party.

5. But no bill of revivor and subpœna ad revivandum, are necessary in this state, as the suit does not abate by death, but the survivor may prosecute or defend if there be a jus accrescendi; or if not, those in interest or representation may be made parties on motion. It is enacted by the legislature:(17)

When the cause of action shall survive, no suit in chancery shall abate by the death of one or more of the complainants or defendants; but upon satisfactory suggestion to the court of such death, the suit shall proceed in favour of, or against the surviving parties. When one or more of the complainants or defendants shall die, and the cause of action shall not survive, the suit shall abate only as to the person or persons so dying; and the surviving parties may proceed without reviving the suit. No bill of revivor shall be necessary to revive a suit against the representatives of a deceased defendant; but the court may, by order, direct the same to stand revived,

(12) 3 J. Ch. 60.
(13) Willis 344. Eq. Draft. 342.— but see 2 R. S. 387-8.
(14) Eq. Draft. 345. see further 341. Willis 347.
(15) Eq. Draft. 343.
(16) or adm'x. Bla. 77. appx. 42.— further, Eq. Draft. 340. 12 J. 500. 1 Hopk. 450. 86. 5 J. Ch.
(17) 2 R. S. 184-5. see 6 J. Ch. 134-132. 3 J. Ch. 23. 60. 61.— 1 Hopk. 450, as to the construction of the former statute, incorporated with some additions into the revised statutes. See Bla. 215.

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representatives are concerned. If no such cause be then shown, the court, upon proof of the reasonable service of a copy of the order upon such representatives, may order the revival of the suit in their names, or the dismissal of the bill, with costs, or otherwise. If a defendant shall die, and the cause of action shall not survive, and the complainant shall neglect or refuse to procure an order for the revival of the suit, the court may order it to stand revived, upon the petition of a surviving defendant, against the representatives of the deceased party. In such case, the surviving defendant may proceed against such representatives, in the same manner as a complainant, to compel them to appear, abide the answer of the deceasd party, or answer, if an answer be required, or to have the bill or his petition taken as confessed against them; and the court may, in its discretion, stay the suit as against him, until such proceedings shall have been had.(16)

§ 51. 6. Or by revivor & supplement.

6. Or the complainant may file a bill of revivor, and supplement a compound of both, new facts being superadded to revivor by way of supplement. It continues the suit abated by death, and supplies defects in the original bill arising from subsequent events, so as to entitle the party to relief on the whole merits.(17)

§ 52. 7. Give notice of death of a solicitor.

7. When a solicitor dies, or is removed or suspended, or ceases to act as such, his client shall be notified to appoint another in such manner as the court shall direct, at least 30 days before any proceeding against him.(18)

§ 53. 8. Commission to take testimony de bene esse.

8. Either party may take the testimony of any witness material or necessary to the prosecution or defence, conditionally, under the act to perpetuate testimony in any suit pending, or about to be commenced in any court of record in this state. The mode of proceeding in this case has already appeared. [ante ch. 3. § 11-15.] But the use of such testimony so taken is limited by the statute to a trial between the parties, or those claiming under them, upon due proof of the death or insanity of the wit-

(16) 2 R. S. 184-5. see as to the proceedings on petition or motion, ante ch. 2.

(17) 5 J. Ch. 334. vid. Bla. 44. 81. appx. Eq. Draft. 348-9. 346.

(18) 2 R. S. 287. § 67. 3 Caines 150. as to the grounds of a suspension or removal, see the statute cited *ante* ch. 1. § 19. see 3 Cowen 252. 261-261. 5 J. 368. 3 Caines 221. 1 J. Cas. 181. 390.

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ness, or his inability to attend trial by reason of old age, sickness, or settled infirmity.[ib.] Where the witness is aged and infirm,(1) about to depart the state to reside abroad,(2) or not likely to return in time to be examined,(3) or is the only witness to prove the case, or a material part of it,(4) or sick, &c. [ante ch. 3 § 11.] the court will, at any stage of a suit pending in court, and before the regular period for examination of witnesses, where the necessity for taking the deposition is satisfactorily shown by affidavit,(5) grant an order for the examination of the witness *de bene esse*, to be read only in case the witness is not in a condition to be examined at the regular period for the examination. The chancellor may direct a commission to be issued to any person or persons, in any cause depending in the court, and the vice-chancellors may also direct such commission in those causes [ante ch. 1 § 3-7.] which they are authorised to hear.(6) Such commission must be issued, upon the petition of the party desiring the testimony, and name the person or persons to whom the commission is prayed to be directed; and such notice of the application given to the adverse party, as the chancellor shall by a general rule, direct.(7) By a general rule of court, if it be necessary to have a commission to take the examination of witnesses in any case not specifically provided for in the rules, (and the present case is one) the party may present a petition to the court for that purpose, setting out the facts which entitle him to a special commission, and the usual notice [ante ch. 2. § 11-13.] of the application must be given to the adverse party.(8) The usual notice [see ch. 2. § 11. 13.] must yield to the exigency of the case, [ib. § 12. ch. 3. § 11.] as where the witness is dangerously sick, or of the age of 70(9) or is about departing the country, the petition and affidavit have been received, andthe motion made without the notice.(10) But in all cases notice of executing the commission is indispensable.(11) Where the applica-

(1) 8 Ves. 31. 1 J. Cas. 103. 429.
(2) 4 J. Ch. 165. 1 J. Cas. 147.
(3) 2 Dick. 454. sed vid. ib. 473.
(4) 3 P. W. 77. 13 Ves. 261. 55. 1 Cox. 177. 423.
(5) 2 J. Ch. 146. see Bla. 152-4.—Newl. 286-9.
(6) 2 R. S. 180.
(7) 2 R. S. 180.
(8) R. 71.
(9) 5 Madd. 364. 8 Ves. 31.
(10) 4 J. Ch. 165.
(11) 4 Bro. C. C 540.

tion is on the ground that a material fact was in the knowledge of a single witness, it seems the affidavit should explain how it so happened. If the affidavit by an agent of the applicant state that he was informed by the witness he would prove the particular fact, and he believed such witness the only person who can prove it, the ground of such belief must be shown.(12) [see ch. 2. § 7.] The defendant, as well as plaintiff, may examine witnesses de bene esse.(13) But it seems the defendant must first put in his answer.(14) Still, it is presumed that this circumstance where the omission or delay of answer is sufficiently excused would not deprive the defendant of the benefit of the testimony. The petition(15) is prepared and presented in the usual manner [ch. 2. § 5-15.] and an order(16) drawn and entered accordingly. But as the preparatory steps and mode of examination, whether before a commissioner or examiner, and the examination at a regular period, or de bene esse, are governed by the same rules, (except in case of examination of witnesses de bene esse or out of the state, the parties are not, as in other cases, required to deliver before the examination, to each other or the officer before whom the examination is commenced, the names, places of abode, and the additions of the witnesses,)(17) the application for a dedimus potestatem and further proceedings thereon will be referred to the general head of examinations in the ninth chapter. It may be here observed in respect to suits instituted purposely, viz. upon a bill filed to perpetuate testimony, the English rule of practice is, that though an answer must be put in before a commission issue, yet where the party stood out all process of contempt, a commission was granted to examine.(18) So also in England, on a bill filed for examination de bene esse, with the proper affidavit annexed,(19) where the testimony is wanted in

(12) Newl. Pr. 236-7. see 1 Maule and Selw. 4. cited, ib.
(13) 1 Dick. 92. 2 Ves. and B.
(14) 2 Fowl. 131. 1 Dick. 92.
(15) see aform. Bla. 46. appx. & forms of commission, &c. ib. 415, &c.
(16) form, Bla. 58. appx. Eq. Draft. 588. see forms in examination de bene esse in supreme court. 7 Cowen 60-3. Caine's Prac. 433-8.
(17) R. 83.
(18) Dick. 355. 19 Ves. 319. vid. 1 Madd. 209. 1 Meriv. 434.
(19) 1 Newl. 58

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an action at law, the order may be obtained before appearance after defendant is served with subpœna. So if a party in an action at law wishes to examine witnesses *abroad* in aid or defence of his suit, he may file a bill for a commission, the bill usually praying for a discovery, or injunction to stay the suit where the applicant is the defendant, and the complainant may obtain an order on motion before answer for a commission for the examination of his witnesses abroad.(20)

(20) Newl. 286-7. 1 M'Cleland 581. This was a suit for discovery and commission merely, plaintiff in equity being the plaintiff at law. Held that a commission to examine witnesses abroad may issue before answer.

CHAPTER VIII.

DEFENCE,

AND

PROCEEDINGS TO DECREE UPON BILL AND ANSWER.

§ 1. Defendant's proceedings prior to answer; analysis.

The proceedings for the defendant until he demurs, pleads, or answers; and for the complainant, as well as the defendant, until a final decree, enrolment, docket and execution be obtained upon *bill and answer*, will constitute the subject of this chapter. The proceedings hitherto have been exclusively those of the complainant, excepting the appearance of the defendant, compelled by process of contempt; or if voluntary, not for the purpose of defence. We will therefore open the proceedings at their earliest stage, and trace, by the following analysis, the order in which the defendant may proceed:

I. *Before Appearance*, by Petition.

1. To defend as a poor person.
2. For appointment of guardian ad litem.
3. To stay proceedings by taking advantage of irregularities which would be cured by an appearance.
4. For leave to appear separately.
5. To set aside default, stay sale, &c.

II. *After Appearance.*

1. By petitions, motions, exceptions or appeal.
   1. To remove the cause into the circuit court of the United States.
   2. To stay suit.
      1. Until security for costs.
      2. Until former costs paid.
      3. On reference to ascertain if suit be for infant's benefit, &c.
   3. To dismiss bill for want of prosecution.
   4. To dissolve injunction or discharge ne exeat.
   5. To except to bill for scandal or impertinence.
   6. Appeal to the chancellor or court of errors.
2. By pleadings, and in the order of arrangement hereafter continued.

BEFORE APPEARANCE.

§ 2. Petition to defend as a poor person.

The principles by which the court of chancery is governed lead to the assistance of persons incapable, from poverty, of defending or asserting their rights. On this account, either a plaintiff or defendant, according to the settled practice in England, is admitted in forma pauperis,(1) and is there considered entitled to the privilege, not from any legislative provision,(2) as plaintiff paupers at law, but from the humanity of the court itself.(3) The right to *prosecute* as a poor person is secured, and the mode of proceeding, in this state, directed by the legislature, as noticed in a preliminary chapter. [ch. 3. § 7-10.] The provisions of the statute are expressly applied to suits in courts of equity, as well as to actions in courts

(1) Grant. In such cases this court (which delights in justice and mercy) will admit such poor persons either to sue or defend in forma pauperis. Harrison.
(2) 11 Henry 7. c. 12.
(3) Newl. 40

of law,(4)and the practice,if it can be considered as having been previously settled in behalf of poor persons *defending* as well as prosecuting,(5) cannot perhaps be deemed as abrogated, by an affirmative statute in favour of the latter, in which the negative intended by the legislature appears to apply more particularly to any other mode of proceeding in the specific case, than to any existing and similar privilege. That mode is by petition, affidavit, and certificate of counsel, [see ib.] and might, with the necessary variations of form, adapted to the relative situation of the party, be applied where the defendant seeks to defend in the character of a poor person. In England the admission to sue is an order on motion of course, [see ch. 2. § 14.] or petition at the rolls, on affidavit of the applicant himself, that his property does not exceed £5 over and above his debts, wearing apparel and matter in question. A similar affidavit, but it seems without the necessity of a certificate of counsel, is required of defendant. But if the party is in possession of the subject matter in dispute, he cannot except it in his affidavit, and therefore, cannot be considered as a poor person.(6)

§ 3.

For guardian ad litem. 1. For infants.

2. A guardian *ad litem* may be appointed for a party legally disqualified to appear in person or by solicitor: [ante ch. 3. § 1. ch. 4. § 1.] 1. In the case of minors: 2. Persons non compas, &c. No person shall be appointed guardian ad litem for an infant defendant, either on the application of the infant or otherwise, unless he be the general guardian of such infant, or a master, solicitor, or other officer of this court who is fully competent to understand and protect the rights of the infant, and who has no interest adverse to that of the infant, and is not connected in business with the solicitor or counsel of the adverse party. And no person shall be appointed such guardian who is not of sufficient ability to answer to the infant for any damage which may be sustained by his negligence or misconduct in the defence of the suit.(7) It shall be the duty of every master, solicitor, or other officer of this court, to act as the guardian ad litem of any

Who may be guardians ad litem.

Officers of the court to act as guardians ad litem.

(4) 2 R. S. 444-5. § 6.
(5) see Bla. 456-7. 44. appx. vid. Eq. Draft. 590-1.
(6) Newl. Grant 11 Ves. 49.
(7) R. 145. as to relations as guardians, &c. see 1 Hopk. 226.—Bla. 332. Mit. Pl. 82.

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infant defendant in any suit or proceeding against him, whenever appointed for that purpose by an order of this court. And it shall be the duty of such guardian to examine into the circumstances of the case, so far as to enable him to make the proper defence when necessary for the protection of the rights of the infant; and he shall be entitled to such compensation for his services as the court may deem reasonable. But if he improperly subject the infant or his estate to any unnecessary costs or expense, or neglect to make a proper defence when necessary to protect the rights of the infant, he shall be personally responsible to the infant for such misconduct or neglect.(8)

The petition for the appointment of a guardian ad litem, must be by the infant in person, if he is of the age of fourteen years or upwards, but if under fourteen, it must be presented by his next of kin or some other friend of the infant, who has no interest in the suit adverse to that of the infant.(9) If not presented within twenty days after the time for appearance, the complainant may apply as directed. [ch. 7. § 40.] The petition is prepared as usual, [ch. 2. § 5, &c. see ch. 4. § 27-29.] the consent(10) of the proposed guardian obtained, and an order(11) of course for the appointment entered, on compliance with the following rule: An order for the appointment of a guardian ad litem for an infant defendant may be entered of course, on filing the petition of the infant if over fourteen years of age, or of some person in behalf of the infant if under fourteen, together with the consent of the guardian and usual affidavit, and a certificate of a vice-chancellor, or an injunction master, or a taxing master endorsed thereon, that he has examined into the circumstances, and that the guardian proposed is a suitable and proper person for such guardian, and has no interest in the suit in opposition to the interest of the infant.(12) No guardian ad litem for an infant defendant, or next friend of an infant complainant, unless he has given security to the infant according to law, shall,

Who may allow guardians ad litem.

Guardian ad litem or next friend not to receive property of infant without security.

(8) R. 143. vid. 1 Hopk. 102.
(9) R. 144.
(10) see Bla. 333. 1 Hopk. 102.—sed vide R. 143. ante.
(11) Bla. 334. vid. Eq. Draft. 582. 597.
(12) R. 146.

as such guardian, receive any money or property belonging to such infant, or which may be awarded to him in the suit, except such costs and expenses as may be allowed by the court to the guardian out of the fund, or recovered by the infant in the suit.(13)

§ 4. Guardians for persons in second childhood, & deaf and dumb, — lunatics, &c.

Guardians ad litem may be appointed for persons superannuated, deaf, dumb and aged, any persons mentally incapable of managing their affairs. [see ante ch. 4. § 1.] The application may be made by some relation or friend.(14) But in cases of infants, persons of unsound mind, the complainant may apply to have a guardian appointed. [ante ch. 7. § 40.] The general guardian of an infant, and the committee of a lunatic are the proper persons to be appointed, though not always. [ante § 3. ch. 4. § 1.] The committee should be made a party in the first instance, [see ch. 3. § 18. ch. 4. § 8. 24.] unless interested, as where a committee was one of the plaintiffs; in such case a guardian ad litem was appointed for the lunatic.(4) In England the lunatic is a necessary party. Here the committee may be made sole defendant. [ib.] If the bill be brought against a lunatic or idiot, stating him to be found such by inquisition, it is a motion of course to apply to the court to assign a guardian to defend; but if the bill do not state the defendant to be such, an affidavit or other evidence will be required to show his state of mind before he will be permitted to defend by guardian. The committee, if there be one, is of course appointed. If not or if interested, a guardian is assigned.(16) Where the committee refuses to answer for the lunatic, a new commission might be applied for; but in ordinary cases a guardian ad litem is of course.(17) And the motion may be made by the plaintiff, grounded on affidavit(18) as before remarked.

§ 5. Petitions to set aside proceedings; — availing of irregularities, and other purposes.

3. As appearance would cure all irregularity of service,(19) the defendant may, before appearance, avail himself of an early opportunity to set aside any pro-

(13) R. 147. The rule extends also to general guardian. see ch. 3. § 32.
(14) see authorities. ante ch. 7. § 40. 2 J. Ch. 235. 238. Eq. Draft. 603. 606.
(15) 1 Dick. 287.
(16) New l. 106.
(17) ib. 2 Dick. 460. 1 Fowl. 477.
(18) 5 Madd. 423.
(19) 2 Madd. 157. 1 Dick. 158. 2 Ves. 384.

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ceedings which the complainant may take on an irregular service, as where subpœna issued before bill filed, in which case the defendant need not appear.(20) If he do, his appearance will be a waiver. Thus where an order had been obtained that service of a *subpœna* on the attorney of the defendant, who resided abroad, and had brought an action at law against the plaintiffs, should be good service; but such order was obtained, and the *subpœna* issued and served two days before the filing of the bill, the court refused to discharge the order for irregularity, holding that the irregularity if any, had been waived by a subsequent appearance of the defendant.(21) But it is a general rule that a party who wishes to avail himself of an irregularity in the proceedings of his adversary, must make the objection the first opportunity after he has information that should put him on enquiry,(22) or the irregularity will be cured.(23) [see ch. 2. § 22.] Hence also, if the bill be not signed by counsel, [see ante ch. 6. § 6.] it may be taken off the file with costs, the defendant being at liberty to avail himself of his right to search into the regularity of the filing ;(24) or where the signature has been put by some other person, may have an order to refer to master to see who set counsel's name to the bill.(25)

§ 6. Petition to appear separately; preparing to remove cause into cir court of U. S. or to appear and answer alone, as where a wife is party.

4. As the defendant must remove a cause into the United States circuit court at the time he enters his appearance, he may, when entitled to remove it, if joined with others, be allowed to appear and defend alone, so as to enable him to remove the cause.(26) Although the general rule is, that the husband must appear for his wife,(27) yet if he has no control over her, as where they live apart he may obtain leave to answer separately, and not be liable to process of contempt for the want of her answer ;(28) and if relief is sought out of her separate estate, when the subpœna must be served on her ;[ch. 7. § 3.] or if sufficient cause appear for allowing her to defend alone, she also may petition for leave; but can-

(20) 1 Grant 124. 126. c. Harr. 110. Newl. 61. see 2 J. Ch. 242. 3 Madd. 434. 3 Atk. 567.
(21) 1 Younge and Jervis 570.
(22) 2 J. Ch. 242. 5 J. Ch. 259.
(23) 5 J. Ch. 191. see post. § 12.
(24) 1 Grant 33. 102.
(25) Eq. Draft. 603.
(26) 4 J. Ch. 94. sed vid. 5 ib. 300.
(27) 2 J. Ch. 139.
(28) 3 Madd. 472.

not, without such leave, appear and answer separately.(18) The court have granted such leave, not only where she claimed an interest in the subject of the suit, in opposition to the husband; but where she could not in conscience consent to the answer drawn up by him;(19) and in one case where, without such leave of court obtained, her answer was deliberately put in by her, without her husband's consent, and was replied to, the court refused to set it aside for want of such order.(20)

§ 7. Petition or motion to set aside default; stay a sale, &c

5. Where a decree pro confesso has been obtained, as pointed out in the last chapter, the appearance of the defendant for any purpose of a defence will have been precluded, until he apply to set aside the default and open the decree. Without such step his appearance would be a nullity. But we have seen [ante ch. 2. § 56. 25] that the court will set aside any order or decree obtained by default or otherwise upon such terms as may be deemed just and proper.(21) This must be upon special cause shown. What will be a sufficient cause will depend upon the circumstances of the case; the time when the defendant applies, (for the maxim *vigilantibus*, &c.(22) is recognized in equity as well as at law) the merits he may show, the excuse he may offer, the terms he may comply with such as answering instanter, paying costs, &c. all which may or not under the circumstances be required by the court. For it rests in the sound discretion of the court to relieve or not. The application is always to its favour, and the defendant must show he is deserving of favour.(23) Where there had been gross negligence on his part, and the principal and most material witness of complainant had died since the bill was filed, the court refused to relieve, as opening the decree would be productive of irreparable injury.(24) Neither will a decree fairly and regularly obtained for want of an answer be set aside to let in a defence founded on a fraudulent speculation.(25) And it has been held that negociations between the parties for a settlement are not suffi-

(18) see 1 J. Ch. 24. Bla. 455. 45. appx. Eq. Draft. 586.
(19) Mitf. Pl. Newl. Atk. 50.
(20) 2 P. W. 370.
(21) R. 126. 3 J. Ch. 415.
(22) 2 J. Ch. 242. 5 J. Ch. 145. 191. 4 J. Ch. 466-8. 671. 682. 687. 13 J. 16. 187. 17 J. 436. 11 J. 228. 1 J. Cas. 133. 436.
(23) 1 J. Ch. 539. 630.
(24) 1 J. Ch. 539.
(25) 1 J. Ch. 630.

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cient to excuse a default in the regular proceedings of the court without the express agreement of the parties.(24) It is held that a decree pro confesso on bill to foreclose, [ch. 7. § 16, 17. 35.] will not, *after a sale* under the decree, and a delay of more than six months, be set aside, unless under very special circumstances.(25) In this case, *after sale*, pursuant to a decree therefor upon bill for foreclosure or satisfaction, taken as confessed against a non-resident, concealed or absent party, we have seen [ch. 7. § 34, 35.] that the sale and conveyance regularly made cannot be effected by his appearance within one year after notice of the decree, or seven years allowed where no notice is given, but that he may file a bill to account for any surplus, over and above the amount justly due on the mortgage and costs of suit.(26) [ib. § 35.] But if he appear before decree for sale, and pay the principal and interest due, with costs, he may have the bill dismissed; if after decree for sale, where further instalments will fall due, he may, on paying the amount due, with costs, stay the sale; but the court will enter a decree to secure the payment of the future instalments. [ante ch. 7. § 22. 35.] Upon these terms a default may be opened or a sale stayed in any case where a bill is filed for foreclosure or satisfaction of a mortgage.(27) In cases where a decree pro confesso has been obtained, and complainant has proceeded to sequester the real and personal estate of an absent, concealed, or non-resident defendant, obtained satisfaction of his decree out of the estate and effects so sequestered, or possession of the property specifically demanded upon executing the security to abide the order of the court touching the restitution thereof in case the defendant appear, and be admitted to defend, as required in either case by the statute, and without which the property remains under the direction of the court to abide its further order,(28) as before mentioned;[ch. 7. § 34.] the defendant, or his representatives, may, within one year after receiving written notice of the decree, or within seven years, without such notice, appear and *petition* to be heard, and upon paying or securing to be paid such costs as the court adjudge, he will be admitted to answer the bill, and the

(24) 1 Hopk. 101. S. P. ib. 106.
(25) 3 J. Ch. 424.
(26) 2 R. S. 187-8.
(27) 2 R. S. 192. § 161-2.
(28) 2 R. S. 187. § 130-3.

suit will then proceed in like manner as if defendant had appeared in due season and no decree had been made.(29) An order for sequestration after return of pluries distringas as mesne process to compel appearance of a corporation, and the decree pro confesso, as well as the sequestration awarded as final process to enforce the decree, might, it seems, under the rule of this court,(30) and by the English practice in the former case,(31) though not as it has been held when awarded [ante ch. 7. § 38.] in the latter(32) be discharged, and the corporation be permitted on terms to appear and answer. In ordinary cases a decree entered on default, may be set aside on *motion*, without a petition.(33) If by *petition*, it is prepared verified, copied and served with copies of affidavit, &c. and notice of motion for a regular motion day in the manner heretofore directed. [ch. 2. § 4-15.] If by *motion* then by copy of affidavit and notice of motion(34) as also directed. [ib.] In case of emergency, as where a sale is about to take place, the usual requisites of service, &c. may be dispensed with, an order ex party obtained to show cause, and to stay proceedings mean time. [ib. § 12] The petition is presented, and motion made at the time before the officer, and in the mode prescribed. [ib. § 14-26.] The order obtained, entered and served, [ib. § 27-35.] and its terms complied with, the defendant may then appear, and must answer within the time required.

APPEARANCE.

§ 8. Appearance when, how, and by whom.

The time within which a defendant must regularly appear after service of process, [see ch. 7. § 9.] and manner of entering such appearance, and giving notice thereof, [ib. § 42.] have been particularized. The defendant also [ib.] might appear 'gratis,' or voluntarily to a bill without waiting to be served, and would then be as amenable for contempts as if served:(2) but he incurs no contempt for not appearing, if he discover that the bill

(29) 2 R. S. 187. § 133-5. 138.
(30) R. 126. *ante*.
(31) Newl. 89, 90.
(32) Prec. Ch. 129: "because the entering the appearance was in favour of liberty, and as a corporation cannot be committed it could be of no service to them."
(33) 3 J. Ch. 415.
(34) 3 J. Ch. 415.
(2) 2 Bro. C. C. 279. 1 Sim. and Stu. 136.

CHAP. not filed at the time subpœna was issued.(3) [ante § 5.] the state appears by the attorney general; [see ch. 7. § 3.] a county by the chairman or clerk of its board of supervisors; a town by its supervisor; [ib.] a corporation usually appear by solicitor, and must answer under their common seal. [see ch. 2. § 18.] An infant, or others under disability, by guardian ad litem; (4) [ante § 3.] a lunatic, &c. by his committee; (5) [see ante § 4.] a wife by her husband, (6) unless she apply for leave to appear and answer separately. [ante § 6.] But her appearance, and appearance alone is not absolutely void. The irregularity is waived by her applying for an order to answer separately, (7) or in the case before mentioned, [ib.] where the opposite party had received the answer, and replied to it.

§ 9. 1. By petitions and motions, &c.

2. AFTER APPEARANCE.

1. Removal of cause.

The defendant must file his *petition*, &c. for the removal of the cause into the circuit court of the United States, at the time he enters appearance.(1) And if a previous application is necessary, it must have been attended to. [ante § 6.] If the cause be not removed, and if the default, if any has been taken, be opened, [ante § 7.] the defendant may apply to stay further proceedings, first, until security for costs be filed. The cases in which security may be demanded, and an order obtained to stay proceedings, mean time, and the mode of executing, excepting to, and justifying the security by bond, are as heretofore stated. [ch. 3. § 3-6. ch. 6. § 33.] It has been the practice to require security from complainant in bill for divorce *a mensa*, &c. any time before answer.(2) A wife now prosecuting must before bill filed in this case, as well as where she seeks a sentence of nullity, prosecute by a next friend, who is of ability to pay all costs awarded. [see ch. 4. § 7.] A similar provision by rule is adopted as to infants, [ib. § 2.] whose next friend, if in-

§ 10. 2. To stay suit until security for costs.

(3) Grant. 129.
(4) 1 J. Ch. 325. 2 J. Ch. 232. 4 J. Ch. 168.
(5) 2 J. Ch. 242.
(6) 2 J. Ch. 139.
(7) 1 Ves 384. 1 Dick. 138. Newl. 109.

(1) When removable 4 J. Ch. 94. see Ingers. Dig. U.S. laws; when not 5 J. Ch 300. 1 Paige 183.
(2) vi.. former statutes 2 R. L. 201. 1 J. Ch. 606. 2 J. Ch. 224. 1 Hopk. 117.

solvent, might be compelled on application of defendant to give security.(3) Previously to the *statute* [ante ch. 3. § 3-6.] the court in case of a non-resident would, on application in due season, that is, before answer, or upon the first opportunity after defendant knew the fact of non-residence, order all proceedings stayed till adequate security given. In which case the court did not limit the sum to that stated in the then existing *rule* of court, but ordered a bond with surety to be executed to the defendant for 750 dollars, and filed with the register.(4) But if the non-residence appeared on the face of the bill, and defendant demurred, plead, or took any other step, or even prayed time to answer, it was a waiver of his right to security.(5) The statute now limits the sum in this, as well as other cases, to 250 dollars, and fixes the prosecuting solicitor's liability at 100 dollars. [ib. § 5.] The defendant may move the court on affidavit of the grounds of application,[ib] or it seems, upon the bill itself, if it state the fact of non-residency,(6) and obtain an order(7) to stay proceedings till security be filed; and the sureties, if excepted to, justify. If the bond be thereupon executed and filed, the sureties justifying as directed by statute, [ib.] operates as a supersedeas to the order to stay.

§ 11 Until former costs are paid.

If the costs of a former suit in court, between the same parties, and relating to the same subject of a second suit, be not paid, the defendant may on motion obtain an order to stay proceedings until the former costs are paid.(8)

§ 12. Staying suits of infant on inquiry whether for his benefit.

If represented upon motion or petition, that a suit preferred in the name of an infant is not for his benefit, an enquiry may be directed, and upon that fact reported, proceedings stayed. So where one of two suits instituted by different next friends, the enquiry may be which is for the benefit of the infant; and the suit not for his benefit will be stayed.(9) The necessity for such applications as heretofore shown, [ante ch. 4. § 2-5.] is in a great measure done away with, since the next friend is now appointed by the court upon special appli-

(3) 1 Paige 178.
(4) 1 J. Ch. 202 see 3 J. Ch 520. 1 Hopk. 117.
(5) 3 J Ch. 520.
(6) Eq. Draft. 585. 3 J. Ch. 520.
(7) See Eq. Draft. 585. order that pltff file security, for time to answer after security filed.
(8) 2 J. Ch. 461. see ch. 2. § 21.
(9) see Newl. 52-3. 2 Meriv. 40.

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cation must be a person competent and responsible for costs, who must, if required, execute a bond in certain cases, to the infant before the appointment. Beside, if the bill be proper in its contents, it is doubtful how far a defendant can apply to stay it. [see ib.] The next friend himself cannot obtain the reference, because by commencing the suit he undertook that it was for the infant's benefit.(10) The infant on arriving at age may abandon it, but cannot compel the next friend to pay the costs, unless it be established that the bill was improperly filed.(11) The application however has been made and suit stayed on affidavits of other relations, stating the suit was brought out of pique, where a bill had been filed by a relation on behalf of an infant, to call the mother, executrix of the father, to an account.(12) The court undoubtedly will in a proper case, acting as guardian over the interests of the infant, see that what is done may be for his benefit;(13) but unless there be a strong case of no benefit or improper motive, the enquiry will not be directed. [ch. 4. § 5.] Where suits are brought in the names of persons not competent to prosecute in person, or appoint a solicitor, and no next friend has been appointed, [see ch. 4. § 1, &c.] it seems the irregularity is not waived by appearance, [ante § 5.] and that application may be made to stay the suit. But where it was alleged that the suit was instituted in the name of a plaintiff in a state of incapacity, but the defendant, by letters, and filing a cross bill, showed that he thought he was dealing with a person able to give him useful discovery, the court refused to take the bill off the file. Where a party subsequently to the commencement of the suit becomes incompetent, if the suit be proper, the court will not on that ground stay proceedings.(14)

Where bill is filed for a person non compos.

§ 13. 3. Dismissing bill.

When the defendant has appeared, he may have an order of course that the complainant deliver a copy of the bill to the defendant or his solicitor, in twenty days, or that the suit be dismissed; and if such copy is not delivered within twenty days after service of notice of such

Order that complainant deliver copy of bill.

(10) 2 Meriv. 141.
(11) 4 Madd. 461.
(12) 3 P. W. 140.
(13) 2 Meriv. 40. 6 Madd. 97. 2 Ves. 484.
(14) 1 Jacob 377.

order, or within such further time as may be allowed for that purpose, the defendant, on filing an affidavit of the service of such notice, and that no copy of the bill has been served, may have a decree dismissing the suit with costs, for want of prosecution.(3) If an injunction or ne exeat has issued, [see ch. 6. § 23.] a copy of the bill must be served on the defendant's solicitor in six days after written demand; if not, defendant may apply to dissolve or discharge, with costs.(4) If an injunction or ne exeat is granted on the certificate of a vice-chancellor, or master, or on an ex parte application to the court before answer, the defendant on due notice may move the court to dissolve the injunction, or discharge the ne exeat, on the matter of the bill only; and if he succeeds in the motion, the court in its discretion may allow him the costs of the application.(5)

§ 14. 4. To dissolve injunction, or discharge ne exeat.

The defendant may move to dissolve injunction on bill only

Or he may take exceptions to the bill (and for that purpose if none has been served, obtain an office copy,) on the ground of its being scandalous, or impertinent. Impertinence so technically termed, of a bill, petition, &c. has been defined. [ch. 2. § 5.] The bill, &c. may be impertinent and not scandalous, that is abusive, but not vice versa. Nothing relevant is scandalous, and the majus or minus of the relevancy is not material.(6) These exceptions may be taken to any pleading, proceeding or matter in court, petitions, affidavits, bill, [see ib. § 5. 7.] answer, plea, &c. or on any proceeding before a master or examiner, in any cause or matter in the court of which they are officers; as in a state of facts, charge or discharge, interrogatories, &c. They are taken in the same manner as exceptions to an answer for insufficiency, and may be submitted to in the like manner, and within the same time;(7) and if not submitted to, referred or considered as abandoned.

§ 15. To except to bill.

Hence from analogy, they must be taken within 20 days after bill filed and served, unless an order be granted for further time.(8) The practice of entering a common order, in case of scandal or impertinence, and of pointing out on the reference the exceptionable matter with-

§ 16. When and how taken.

(3) R. 29. see proceedings *post*, dismissing after answer.
(4) R. 35.
(5) R. 34.
(6) See Hoff. Mr. 318. 24 Bla. 301-2. 207 1 Hopk. 293. 1 J. Ch. 106.
(7) R. 53.
(8) See R. 50.

CHAP. VIII. out written exceptions filed or served, has been sometimes adopted, and from its convenience recommended.(1)

But as exceptions for insufficiency to answer must always be in writing, signed by counsel, filed, copied and served, with notice of filing, and entered with the master to whom by the order previously entered, the same is referred; and as exceptions to the bill or other matter for scandal or impertinence are now put upon the same footing, by the rule of court,(2) the proper course would be: To draw and engross the exceptions; specifically pointing out the exceptionable matter, in the particular parts of the bill, &c. on file, or if a copy has been received in the copy thereof according to its page and mark (as all copies of pleadings and proceedings including of of course, the exceptions and copies, must be paged and marked to correspond. [see ante ch. 2. § 9.] The exceptions being signed by counsel, are copied for service, and filed in the office of register assistant register, or clerk. [see ch. 2. § 33.] A copy of the exceptions (marked and paged) with notice that it is a copy of the original filed, &c. is served by the party excepting (now the defendant) on the adverse party, that is in case of bills, on the complainant in person (ante ch. 2. § 13.]

§ 17. Submitting.

The party excepted against (now the complainant) within eight days after the exceptions taken, may give notice of his submission to any or all of them, and is liable for costs of such as he submits to.(3) If to all, the exceptant may, after the matter submitted to is expunged as might be at once by the solicitor in presence of the exceptant attending at the office where the proceedings filed, or by consent and immediate reference to the proper officer for that purpose as hereafter mentioned; the exceptant may proceed to have his costs taxed, and if necessary collected by attachment, but if part only are submitted to, the costs are reserved till the whole subject is disposed of, and then taxed together and enforced as hereafter directed.(4) If not submitted to, the exceptant must refer, within ten days after the time

§ 18. If not, then reference.

(1) vid. Hoff. Mr. 312-13.
(2) R. 53. see *ante*
(3) R. 50.
(4) by R. 57, 58. post.

allowed for submitting, by order of course the exceptions not submitted to, or such of them as the exceptant thinks proper: and every exception not submitted to, and which is not so referred, will be considered as abandoned.(2) The order of course for reference being drawn, engrossed, paged and marked, [see ch. 2. § 9 32-4.] is entered as usual, and a copy served on adverse party, and another left with the master authorised, [see ib. § 35-7.] A summons or warrant for attendance underwritten, to proceed on the reference of complainant's bill for scandal (or impertinence) is served,(3) on the adverse party in the manner of services directed, [ib. § 39. 10. 13.] and the reference conducted in like manner [see § 38, &c.] On the day appointed in the summons, or fixed by the master, the exceptant and adverse party, if he please, or his counsel, if the warrant be attended by counsel, (but the master may proceed exparte) [ib. § 45.] attends with an office copy of the bill or other matter excepted to, or the copy thereof, if he had received any from the adverse solicitor, and points out in presence of the adverse party the excepted matter. The argument thereon finished, the master afterwards makes his report.(4) If the party obtaining the reference do not procure and file the report in 20 days from the date of the order therefor, the exceptions will be deemed abandoned, unless the master within that time certify that a further time, to be inserted in his certificate, is necessary, to enable him to make a satisfactory report; in which case the exceptions will be considered as abandoned if the report be not obtained within the further time.(5) The report on exceptions, is delivered to the party obtaining reference. It must be forthwith filed by the party taking the same in the proper office, and if not excepted to in 8 days, becomes absolute as against him. But the adverse party has 8 days after service of notice of such filing, to except; and if he do not, it then becomes absolute against him, without any order for that purpose.(6) If exceptions to report be taken, the proceedings are consequently delayed till the final disposition of such ex-

§ 19. Speeding reference or abandoning exceptions.

(2) R. 53. 51.
(3) 1 Grant 141.
(4) 1 Grant 141-2. see form of report. Hoff. Mr. appx. No. 78.
(5) R. 54.
(6) R. 56.

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ceptions in the manner hereafter pointed out under exceptions to report of master on exceptions to answer. But if no exception to the report be taken within the limited time, and if the master report that any thing in the pleading or proceeding is scandalous or impertinent, the exceptant, on filing proof that the report has become absolute against the adverse party, may have an order, of course, that the proper officer of the court expunge the scandalous or impertinent matter, and that the adverse party pay the costs of the exceptions and proceedings thereon within 20 days after service of copy of such order, and of the taxed bill on him or his solicitor, or that an attachment issue against him.(7) [see ante ch. 2. § 21.] Where the adverse party submits to the exceptions, the same order may be obtained on filing the notice of submission.(8) But the exceptant will be entitled only to the costs of exceptions submitted to, and those finally allowed after reference. No part of the costs of reference will be allowed the party obtaining it, unless the major part of the exceptions are finally allowed; but if any of the exceptions referred are sustained, the adverse party will not be entitled to costs on the reference. The costs will not be taxed until all the exceptions are submitted to, abandoned, allowed, or finally disposed of. And then the whole costs to which the exceptant is entitled must be included in one bill, and the adverse party may off-set any costs to which he is entitled.(9) The report filed, and office copy taken, an order of course is entered, which, in the language of the common motion therein expressed is, "that it may be referred back to the master to expunge the scandalous (or impertinent matter,) (10) and tax the costs, &c.(11) Copy of the order being obtained and served as before, and a summons or warrant taken out underwritten accordingly, on the day and hour therein fixed, the clerk being notified and attending the master, with the record of the original pleading filed, the master, in presence of all the parties expunges, by striking his pen through what appears from the report to be scandalous or impertinent, and sets his initials against it in the margin.(12) The costs are then taxed, and if not paid, collected as before directed.

(7) R. 57.
(8) ib.
(9) R. 36.
(10) 1 Grant 142.
(11) see Eq. Draft. 537.
(12) 1 Grant 142.

§ 21. Appeal.

If either party feel himself aggrieved by any interlocutory order on which an appeal lies [see ch. 2. § 62.] in any of the proceedings heretofore described, he has a right: 1. if the order be in a cause or matter pending before a vice-chancellor, to appeal to the chancellor; 2. if before the chancellor, or a vice-chancellor acting where the chancellor is a party, or interested, or where the order had been first on appeal reviewed by him, to the court of errors. The cause will thereupon be conducted through the court in the manner already directed, [ch. 2. § 66-79.] until the order becomes modified pursuant to the decree of the court above; when the defendant in the present stage of the suit will proceed in his defence, viz.

§ 22. Pleadings;—time allowed to plead. and extending the time.

2. BY PLEADINGS:

1. Demurrer.
2. Plea.
3. Cross bill.
4. Disclaimer.
5. Answer.
   - In confession.
   - Avoidance.
   - Denial.
6. Answer plea and demurrer united.

The theory of pleadings not being embraced within the plan of the present treatise, [ante ch. 1. § 8.] will be but slightly alluded to, while the attention of the solicitor is invited to the practice under this head, in the order of the analysis thus continued. [ante § 1.] If the bill be free from scandal and impertinence, or the same be not excepted to, the counsel to whom the bill is submitted will advise the defendant whether to demur, plead, or answer.

If the defendant's mode of defence rests on the bill, and on the foundation of matter there apparent, and demands the judgment of the court whether the suit shall proceed at all, it is termed a demurrer. It is defendant's allegation admitting matters of fact to be true, but insufficient

See *select forms, references to forms and practical directions*, vol. II. ch. viii.

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to oblige him to answer, and demanding the judgment of the court thereon. If on the foundation of new matter offered, it demands the judgment of the court whether the defendant shall be compelled to answer further, it is termed a plea. If it submit to answer generally the charges in the bill, and demands the judgment of the court on the whole case, made on both sides, it is called simply an answer.(1) The ordinary time allowed defendant after appearance, to answer,(2) (which may be by demurrer, plea, or by answer, strictly so called,) is forty days after service of copy of bill and notice of the order as before directed, [c. 7. § 43.42.] Further time to answer the complainant's bill, not exceeding sixty days in case of a resident defendant, and not exceeding six months in case of a defendant who is a non-resident of the state, may be granted on application and sufficient cause shown by affidavit to a vice-chancellor or injunction master, and on such terms and conditions as he may direct. But no such order for time shall be granted by an injunction master, or by a vice-chancellor out of court, after the time for answering has expired, or where time has before been granted by order of the court, or by a vice chancellor or master, or by agreement of opposite party.(3) The court, upon special cause shown, may extend the time for putting in or serving any pleading, or for any proceeding which is required by the rules of the court to be done within a limited time.(4) By the English practice, although the defendant may, as of course, obtain orders for a further time to plead or answer, yet such indulgence is not allowed to a demurrer where the party intends to demur to the whole bill;(5) the order being on further time obtained "to plead, answer, or demur, not demurring alone." No extension of time is, unless a very special ground is laid, allowed for putting in a demurrer to the whole bill; it being presumed that counsel may advise upon demurring or not at sight.(6)

§ 23. An injunction master may extend time to answer; the court on cause shown may extend time in all cases.

(1) Newl. Mitf. Pl. Eq Draft. 584. 586. 602.
(2) R. 24. see Bla. 106. 4 J. Ch. 365.
(3) R. 125. see Bla. 44, 45. appx.
(4) R. 126.
(5) see Newl. 112-14.
(6) Grant.

DEMURRER.

§ 24. Demurrer;—the objects & grounds of demurrer.

The principal objects of demurrer are, to avoid discovery prejudicial to defendant; cover defective title; prevent unnecessary expense. It is otherwise of little use, as generally, if demurrer would hold, the court would not give relief if bill answered. The principal grounds of *demurrer*,(1) in bill for relief,(2) are: that the subject of the suit is not within the jurisdiction of the court;(3) that plaintiff has some personal inability to sue; that he has no title or no interest for instituting a suit on the subject; no right to call on defendant on the subject; that defendant has not an interest to make him amenable to plaintiff;(4) that for some reason in the case, complainant is not entitled to the relief prayed; inadequacy of the bill to obtain complete justice; confounding distinct subjects, or unnecessarily multiplying suits.(5) In bill of discovery merely, the causes of demurrer are: that a court of equity has not jurisdiction to compel discovery in the case made; want of interest in complainant to entitle him to discovery from defendant; that he has even no right to institute the suit; not sufficient privity of title between the parties to give plaintiff right to the discovery required; discovery not material, if obtained; defendant's situation rendering discovery improper to be compelled,(6) and for multifariousness.(7) As the demurrer asserts no fact, and relies merely upon matter apparent upon the face of the bill, it is not sworn to, nor signed by defendant; but being signed by solicitor and counsel, is filed with the register, assistant register or clerk, and a copy served on the complainant. [ante ch. 7. § 43.]

§ 25. Amendment of bill, when of course,—within 10 days after demurrer; when on special application; defendant has the original time after amendment; if no amendment

If defendant demurs to the bill for want of parties, or for any other defect which does not go to the equity of the whole bill, the complainant may amend of course on pay-

(1) see also, Bla. 110-12. 1 Johns. Dig. 340. see form, Bla. 112. Eq. Draft. 424. 4 Cowen 667.
(2) 1 J. Ch. 57. 1 Paige 284.
(3) 2 C. C. in E. 1. 4 J. Ch. 287. 1 Hopk. 119.
(4) Grant. Mitf. 4 J. Ch. 549. Eq. Draft. 419. 421. Bla. 93-5. appx.
(5) Grant. Mitf. Bla. 93. 96. 97. appx. Eq. Draft. 422. 4 J. Ch. 199.
(6) Mitf. Pl. Grant. Eq. Draft. 423. 419.
(7) 2 Sim. and Stu. 79.

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then notice for argument; setting cause down; copies of pleadings; abbreviated case; points; withdrawing demurrer.

ment of costs, at any time before the demurrer is noticed for argument, or within ten days after receiving a copy of the demurrer; and in all cases of demurrer for causes not within the former part of this rule, the complainant's right to amend, and the terms on which amendments may be permitted, shall be in the discretion of the court; but no amendment of course under this rule shall be allowed, where the bill has been sworn to by the party.(1) The order of course or special, and where entered, has been noticed. [ch. 2. § 28-33.] In all cases where complainant is permitted to amend his bill if the answer has not been put in, [see ante § 47.] or a further answer is necessary, the defendant will have the same time to answer after such amendment as he originally had.(2) If the complainant do not, within the ten days allowed, amend his bill, either party may notice the demurrer for argument, at the next or any subsequent term,(3) and have the case entered on the calendar of causes for the term.(4) The notice is for the same time as required in other notices(5) of hearing, special motion, or presenting of petitions, [ante ch. 2 § 11. 13.] and if the adverse party appear in person, or by solicitor, service is as directed, and if on an agent or by affixing, for double time. [ib.]In making up the calendar,demurrers and pleas constitute the second class of causes, [those on bills taken as confessed having a preference as mentioned—ante ch. 7. § 14.] and have priority from the time when the demurrer or plea was filed.(6) The causes are noticed for first day in term, or as early a day as practicable. The note of issue is the same as in other cases, [four days before term,] and if the cause is not in readiness for hearing in time to notice for the first day, it may be placed at the foot of the calendar.(7) When the cause is heard or submitted on demurrer, [and if submitted, must be as before directed, ch. 2. § 69. p. 64.] the court must be furnished with copies of the pleadings, and an abbreviation thereof not exceeding one sixth of the number of folios contained in the originals.(8) And in all cases the nesessary papers must be furnished by the party demurring when the hearing of the cause shall com-

(1) R. 44. 47. see 1 J. Ch. 434.
(2) R. 45.
(3) R. 47. vid. Bla. 112. 158. 161. 107-8. 54. appx.
(4) R. 88.
(5) R. 89.
(6) R. 91.
(7) R. 92.
(8) R. 93.

mence.(9) And each party must deliver to the court and the adverse party a copy of the points on which he relies.(10) If defendant think demurrer cannot be supported he may withdraw it, on payment of costs to be taxed.(11)

§ 26. Argument;—dismissing bill on demurrer; granting leave to amend; reinstating the cause, or entering and executing the decree of dismissal.

Causes of a demurrer may be assigned *ore tenus* at the bar,(12) and if allowed, the defendant will not pay costs of demurrer on record being overruled.(13) But it is said defendant cannot thus demur on a ground which he has not made the subject of demurrer on the record; as if the demurrer be for discovery, he cannot *ore tenus* demur to the examination of witnesses *de bene esse*.(14) If the defendant prevail on demurrer, the bill is dismissed.(15) If an injunction had issued, an order may be moved for to dissolve it, on demurrer allowed to the whole bill.(16) Though strictly by a demurrer to the whole bill argued and allowed, the bill is out of court, yet to avoid this the court sometimes, instead of deciding upon the demurrer, gives the complainant leave to amend his bill, on payment of cost incurred by defendant; and even after a bill dismissed by order, it is in the discretion of the court to set the cause on foot again.(17) If dismissed, the defendant having moved for costs, [ch. 2. § 80.] may proceed to enter the order of dismissal, [ch. 2. § 28-33] tax his costs, [ib. § 81, 82.] enrol his decree, and if he pleases, cause it to be docketed and transmitted, as directed, [ib. § 83.] and issue his execution. [ib. § 84.]

§ 27. Overrulin demurrer; if overruled as frivolous, pro confesso; if otherwise defendant to answer in 20 days or pro confesso, or answer compelled; amendment of bill after demurrer overruled.

But if the bill be good in part, and bad in part, it will not be dismissed. Thus where the bill is for discovery and relief, and the complainant is entitled to answer to any part as for discovery, a general demurrer will be overruled. The defendant should have answered as to discovery, and demurred as to relief.(18) If demurrer

(9) R. 94. 93.
(10) R. 94.
(11) Newl. Grant. Bla. 42. appx.
(12) 6 J. Ch. 139.
(13) Wy. Pra. Reg. 163. Grant.
(14) Newl. 116. c. 17 Ves. 213.
(15) 4 J. Ch. 199. sed vide Eq. Draft. 608–9. 613.
(16) Eq. Draft. 613.
(17) Newl. Grant. Mitf. 11 Ves. 72. If dismissed for want of equity on the merits of the case as stated, it is said (Bla. 212.) leave to amend bill will not be granted.
(18) 4 J. Ch. 294. 5 J. Ch. 184. 2 C. C. in E. 341.

be *overruled*,(2) defendant must answer, as the demurrer is never allowed to stand for an answer.(3) But if the demurrer be overruled as frivolous, the complainant may have an order to take the bill as confessed, [ante ch. 7. §8.]or he may compel [ante ch. 7. § 41.]the defendant to answer the bill at his election. In all other cases, if the demurrer be overruled, no other demurrer shall be received, and the defendant must answer the bill, and pay the costs of the hearing, within twenty days after notice of the order overruling the plea or demurrer, or such other time as may be prescribed by the court in such order. If he fail to put in his answer and pay the costs within the time prescribed, the bill, or so much thereof as was covered by the plea or demurrer, may be taken as confessed, and the matter thereof decreed accordingly; or the complainant may have an attachment [ante ch. 7. § 41.] to compel a further answer.(4) If the demurrer be overruled, the complainant may within ten days thereafter amend his bill of course and without costs. But as before observed, in all cases where the complainant is permitted to amend his bill, if the answer has not been put in, or a further answer is necessary, the defendant will have the same time to answer after such amendment as he originally had.(5)

2. PLEA.

§ 23 Plea

A plea is a special answer to a bill on which an objection is not apparent so as to admit of demurrer, showing and relying on one or more things, but resting the defence on a single point,(1) as cause why the complainant should not obtain the relief asked, and why the suit should be abated, dismissed or barred. Pleas are either to relief; to the jurisdiction; to the person, whether under any disability(2) as alien enemy, bankruptcy, cover-

(2) See Bla. 54. app. Eq. Draft, 608-9.
(3) 3 Atk. 530.
(4) R. 49.
(5) R. 45. see ante R. 44.
(1) 3 J. Ch. 384. 427. 7 J. Ch. 214. As to the requisites of a good plea, 3 J. Ch. 427. 4 J. Ch. 693. 20 J. 668. on affirmance of 5 J. Ch. 555. 4 J. Ch. 437. 1 J. Dig. 332. 341. ante ch. 2. § 5. 2 Cowen 140. 1 Hopk. 48. 1 Cowen 711. 4 Cowen 618. 635. 638. 625. Pleadings should be fairly written, paged and endorsed; see ante ch. 2. § 9.
(2) 4 J. Ch. 549.

ture, assuming a false character; or in bar,(3) as of a former decree enrolled,(4) upon the same point in issue between the same parties,(5) or on the merits,(6) and not otherwise,(7) in former bill, if the bill was not dismissed without prejudice;(8) or in abatement and dismissal, another suit pending;(9) or in bar the statute of limtations,(10) [see ante ch. 3. § 16.] or statute of frauds.(11) In suits for the payment or recovery of money, set-offs shall be allowed in the same manner, and with the like effect, as in actions at law.(12) If defendant wish to plead double, he must apply to the court, and leave may be granted under circumstances.(13)

§ 29. Plea; jurat; Dedimus potestatem to take plea abroad.

All pleas are signed by counsel.(14) But only those in bar of matters *in pais* (not to jurisdiction, nor in disability of plaintiff or defendant, or in bar of matter of *record*) are on oath.(15) The *jurat* is the same required for petitions, &c. [see ch. 2. § 8. 7. 9. ch. 6. § 4.] and if an answer also be taken, it ought to appear distinctly that defendant was sworn to the plea as well as the answer.(16) The oath may be administered by any officer authorised by law to administer oaths in judicial proceedings in this state. [ib. § 7.] If defendant be abroad, a commission to take his plea, *under oath*, may be applied for, and proceedings thereupon will be similar to those upon a commission to take an answer.(17) If an oath be

(3) Eq. Draft. 444. 447. 448. 1 J. Bla. 92. app. Outlawry abolished. 2 R. S. 553 745. Plea by feme covert in her own name, Bla. 90 app. 18 J. 562. 4 J. Ch. 549. Harrison. Grant. Bla. 114, 115. see 20 J. 668. 1 J. Dig. 341. Eq. Draft. 427-39.

(4) 4 J Ch. 300.

(5) 14 J. 501. 7 J. Ch. 1.

(6) 4 J. Ch. 140. 7 J. Ch. 286.

(7) 4 J. Ch. 300.

(8) 4. J. Ch. 140. 7 J. Ch. 286.

(9) Bla. 115. 89. appx.

(10) 1 Paige 239. 4 Cowen 618. 629. 8 Cowen 360. 3 J. Ch. 384. 5 J. Ch. 545. Eq. Draft. 443. Bla. 89. 91. appx. 1 J. Dig. 296-7. 301.

(11) Eq. Draft. 445-6. 440.

(12) 2 R. S. 174. § 40. see post, ch. 9. see 2 Cowen 140. 1 Hopk. 239 579. 5 J. Ch. 265.

(13) 7 J. Ch. 241. 4 Madd. 241.

(14) Mitf. Grant. Newl. But signature of counsel not required to plea taken by commission, 4 Madd. 366.

(15) 18 J. 562. Mitf. Grant. Beame's El of a plea in Eq. Bla. 114, 115. The exceptions seem to be founded on an ancient order, that pleas in disability of the person, or to the jurisdiction should be received & filed, though defendant do not deliver the same in person or by commission.

(16) Newl. 117.

(17) Qu? may not the plea be sworn to out of the state, in the manner directed. ch. 2. § 7. see R. 41 post.

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waived in the bill [ante ch. 6. § 5. 17.] such commission would not, it seems, be necessary. In England the oath, or oath and signature of defendant abroad to an answer is often waived on special application, but this is usually in amicable suits by consent, where there is every reason to be satisfied of the truth of the answer without oath.(17) Generally the same rules as in case of answers apply to pleas, respecting orders for time (a plea to the whole bill being allowed under the usual order for time to plead, answer or demur, or to answer alone,) signatures, naming commissioners, and executing commission; and if the plea be taken by commission, without oath, the irregularity is not waived by plaintiff taking a step in the cause, but the plea may still be taken off the file.(18) The mode of applying for and executing the commission will be presently mentioned, under answer.

§ 30. Amendment of plea or bill; setting down for hearing or noticing for argument;— proceedings to hearing;— replication allowed after hearing; if defendant pleads matter of record;— reference to masters as to the truth of the plea.

The complainant may refer the plea for impertinence [ante ch. 2. § 5. ante § 15. post, exceptions to answer,] but if it be afterwards set down for argument, reference waived is,(19)may amend his bill [ch. 7. § 47.] after plea interposed or overruled,(20) [ante § 25.] as in case of demurrer. [ib. § 26, 72.] The complainant has ten days after defendant pleads to file a replication to the plea or amend his bill; and if he do not take issue on the plea, or amend his bill within that time, either party may notice the plea for argument at the next or any subsequent term,(21) and the proceedings thereupon will be as in case of demurrer. [ante § 25-6.] If the plea *allowed*,(22) the complainant may, within ten days after notice of such allowance, take issue on the plea upon payment of the costs of the hearing thereon,(23) whereupon the defendant must make proof of the truth of his plea by depositions, as in case of answer.(24) The proceedings upon issue thus taken will appear in the next chapter. If the plea be *overruled*,(25) the complainant may within ten days thereafter amend his bill of course, and without costs.(26) But in all cases the defendant

(17) Grant. see *post*.
(18) Grant. Newl. 2 Ves. and B. 357. 1 Bro. C. C. 56.
(19) 1 Cox. 412.
(20) see R. 45. ante.
(21) R. 47. 4 J. Ch. 166. 549. see 605. 294.
(22) Eq. Draft. 608-9.
(23) R. 47. see 4 J. Ch. 166.
(24) Newl.
(25) Eq. Draft. 608.
(26) R. 45.

will have the original time to answer, as in case of amendments after demurrer. [ante § 25.27.] Where there is a mere slip in the form of the plea, and the material ground of defence seems to be sufficient, the court will, at the time that it overrules the plea, give liberty to amend.(27) And by the English practice, defendant may, if he think his plea cannot be supported, obtain leave to withdraw it, and plead *de novo* within a short period.(28) But if overruled, a second plea will be inadmissible according to the general rule which will be presently recited. If the defendant plead a former decree, another suit pending for the same cause, or other matter of record in this court, he shall, at the time of filing such plea, obtain an order of reference to a master to examine and report whether the plea be true, and he shall procure the master's report within twenty days thereafter. If he neglects to procure the master's report within that time, or the report is against the verity of such plea, the same shall be considered as overruled, and the complainant shall be at liberty to proceed as if no such plea had been filed. But if the master's report establishes the truth of the plea, either party may notice the same for argument, at any time after the report is confirmed.(29) By the English practice, if the plea on argument being deemed defective in form or substance is not therefore allowed, either the benefit of it may be saved to the hearing, or it may be ordered to stand for an answer: if saved, it is considered a defence, if not avoided afterwards by plaintiff; if it stand for an answer, it is considered as either not a full defence, or informal by way of plea; or not properly supported by the answer, and therefore doubtful; but is allowed as a sufficient answer to so much of the bill as it covers, unless by the order liberty is given to plaintiff to except. If the plea state nothing which can be a defence, it is merely overruled. If the plea be accompanied by an answer, and ordered to stand for an answer, without liberty to except, still the plaintiff may except to answer as to those parts not covered by the plea.(30)

(27) see Bla. 214. 4 J. Ch. 693-7. 2 Ves. and B. 150. 13 Ves. 230. 234. 2 Bro. C. C. 147. 2 Ves. Jr. 85.

(28) 5 Ves. Jr. 87. sed vide 6 J. Ch. 242 Bla. 42. appx.

(29) R. 48. see Bla. 114-15.

(30) Grant. Mitf. 6 Ves. 18. 2 Atk. 241.

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A plea may be good in part, and bad in part; and where it is more extensive than the subject matter to which it relates, it will be allowed to stand, as to so much of the bill to which it properly applies; and the defendant must answer the residue.(31) But though a plea ordered to stand for an answer, must be deemed sufficient, so far as it covers the bill, yet the complainant may except to the residue of the answer, but not without special leave.(32) If a plea be overruled as frivolous, or a plea, upon issue taken thereon, is found to be untrue, the complainant may have an order to take the bill as confessed, or he may compel the defendant to answer the bill at his election. In all other cases, if the plea be overruled, no other plea shall be received; and the defendant shall answer the bill, and pay the costs of the hearing, within twenty days after notice of the order overruling the plea, or such other time as may be prescribed by the court in such order. If he fail to put in his answer and pay the costs within the time prescribed, the bill, or so much thereof as was covered by the plea, may be taken as confessed, and the matter thereof decreed accordingly; or the complainant may have an attachment to compel a further answer.(33)

If defendant put in false or frivolous plea, bill may be taken as confessed.

After plea overruled, defendant to answer in 20 days.

3. CROSS BILL.

§ 31. Cross bill.

A cross bill is a defence:(1) by defendant against complainant, to enable him to defend himself in the suit, by stating his case more advantageously than he could do by his answer, and to obtain some necessary discovery, and more complete relief. Or by one co-defendaut against another during the suit, whose interests the court cannot decide upon without such bill. The complainant then of course becomes a defendant in his turn, and must pursue generally the mode of proceedings pointed out for defendant.(2) Where counter claims existed which could not, [previously to the statute recited ante

(31) 20 J. 668. on affirmance of 5 J. Ch. 555. 6 J. Ch. 242.
(32) 6 J. Ch 242.
(33) R. 49 see 4 Cowen 618. 629. 630.
(1) 3 Atk. 811.
(2) see as to cross bill, Granf. Bla 25. 44. see 2 J. Ch. 339-355. 429. 475. 8 Cowen 361. 1 Hopk. 239. 48 *post*. 18 J. 563. 6. 5 J. Ch. 262. 265. Eq. Draft. 355.—20 J. 685.

§ 28.] be set off in equity, they might become the subject of a cross bill. Thus the object of a suit for foreclosure is to obtain satisfaction from the lands; and it was held inconsistent with the nature of such a mortgage security to allow a set off. Therefore, where such counter claims existed, and were liquidated, the course of proceeding in equity required that they should be presented by way of cross bill.(3) Or a bill might be brought to redeem where the mortgage had been assigned without giving credit, for the assignee takes it subject to such set off.(4) A cross bill is in the nature of a defence. It cannot introduce new and distinct matters not embraced in the original suit, and if it does so, no decree can be founded upon those matters. In such a case the original bill would be dismissed with costs, in favour of the original defendants upon both that and the cross suit.(5) The bill must be filed before publication in original suit,(6) unless the plaintiff in the cross bill go to hearing on the proofs already published. If filed after publication, testimony in the cross bill cannot be read or used.(7) Where there has been very great delay and negligence on the part of the defendant, he will not be allowed to file a cross bill, nor amend his answer, nor issue a commission, so as to delay the plaintiff.(8) But the court may at a hearing direct a cross bill to be filed, when it appears that the first suit is insufficient to bring before the court the rights of the parties, and the matters necessary to a full and just determination of the cause.(9) The practice in England on a cross bill being filed is not to stay proceedings in the original cause, but to stay publication only until the answer comes in to the cross bill, and it is a motion of course to stay proceedings in the original cause, if plaintiff in the cross-cause had brought his bill before he had put in an answer to the original bill.(10) In such case where the defendant to the cross suit was in contempt for not putting in an answer to the cross bill, the plaintiff in this suit might, of course, have publication in the original enlarged, after the answer to

§ 32. When filed, & proceedings thereupon.

(3) 1 Hopk. 239. see 5 J. Ch. 265. 1 Hopk. 48.
(4) 1 Hopk. 579.
(5) 1 Hopk. 43. But see 2 J. Ch. 339-355. 1 J. Dig. 338-9. authorities, ante n. (2.)
(6) 1 J. Ch. 62. 4 J. Ch. 357. 7 J. Ch. 250.
(7) ib.
(8) 4 J. Ch. ib.
(9) 7 J. Ch. 250.
(10) 4 Bro. C. C. 478. 1 Atk. 20 Bla. 457.

CHAP. VIII. the cross bill is in, as the discovery afforded by such answer might be of service to him in penning his interrogatories. But if the cross bill was filed after the original cause was proceeded in, as if answer had been put in to the original bill, it is by no means of course to enlarge publication; but the application for it should be a special motion with notice; as otherwise the hearing of the original cause might be often vexatiously delayed. If the delay in not filing the cross bill before can be satisfactorily accounted for, the court will be induced, unless great inconvenience may be the result to the other party, to grant the application; but in a case where the cross bill was not filed until rules given for passing publication, and the original cause set down for hearing, the application was refused with costs.(11) Neither is it here a matter of course to stay proceedings, or to enlarge publication in the original cause, until an answer be put in to a cross bill filed after proceeding or answer in the original cause; but it must depend on special circumstances.(12) And by a rule of court where a cross bill is filed, the complainants therein, who are defendants in the original bill shall put in, and perfect their answer to the original bill before they shall be entitled to an order to compel an answer to the cross bill, unless the court shall otherwise specially direct.(13) The English practice is also, that the original must be first answered, before an answer to the cross bill can be enforced. And if process of contempt be issued, proceedings on the cross bill would be stayed by order. Defendant to cross bill is then entitled to the usual time after answer to the original.(14) But though the original must be first answered, yet if after the cross bill filed, complainant in the original, amend his bill, he loses his priority,(15) without regard to the materiality of the amendments,(16) and must answer the cross bill before he is entitled to compel an answer to his amendments. The proceedings in the original are not stayed merely by the amendment, but on such amendment plaintiff must move that proceedings in the original be stayed till the cross bill be answered.(17) So where a bill became abated by mar-

(11) Newl. 298. and authorities cited, viz 1 Atk. 20. 291. 16 Ves. 93. 132. 2 ib. 336.
(12) 4 J. Ch. 357. 7 J. Ch. 250.
(13) R. 42.
(14) Harr. Hinde. Grant. Newl.—
(15) 2 P. W. 435.
(16) 2 Madd. 392. 2 Cox. 371.
(17) 2 Madd. 392.

riage of a female plaintiff, [see ante ch. 7. § 49.] and she and her husband did not revive until after a cross bill filed, were held to have lost their priority.(18) The cross bill being a defence, and therefore but one cause with the original,(19) both causes may on motion be brought on to hearing together, the one being advanced, or the other adjourned.(20) But a cause will not be adjourned when in the paper, because a cross bill has been filed, to which no answer had been put in.(21)

4. DISCLAIMER.

§ 33. Disclaimer; answer by way of disclaimer, or answer and disclaimer.

If a defendant claims no right or title to the matter in demand by the complainant's bill, or any part of it, he may put in a *disclaimer* renouncing all claim, or pretence of title to such matter,(1) or *by his answer*, upon oath, deny the same, and renounce all claim and pretence of title thereto.(2) A disclaimer, though strictly distinct from an answer, is usually put in under the title of an answer, or together with an answer, and upon oath.(3) It is seldom that defendant would be entitled to put in a disclaimer alone; for though he may not at the time have any title or claim on the subject, yet he might have had an interest which he has disposed of; it seems, therefore, that the plaintiff is entitled to an answer, on that point where defendant has parted with his interest in order to know who instead of him is the proper person to make defendant.(4)

§ 34. General disclaimer; no replication; otherwise to a disclaimer to a part of the bill; proceedings;—costs of disclaimer; effect of answer and disclaimer.

There is no replication to a disclaimer generally to the whole bill, but otherwise, where the disclaimer is to a part only.(5) In the former case the plaintiff usually, upon motion, gets the bill dismissed against him on payment of costs; for if the plaintiff bring the cause to a hearing, generally it will be dismissed as against the disclaiming defendant. But it is said that if the plaintiff had probable cause for exhibiting his bill, he may pray a decree against such defendant, and all claiming under him

(18) 1 Dick. 260.
(19) 3 Atk. 811.
(20) Newl. 314. Grant 200. see *post*.
(21) 4 Madd. 262.
(1) Newl. 139.
(2) Wy. Pr. Reg. 175.
(3) Grant. Newl.
(4) Newl. Mitf.
(5) 3 Atk. 582.

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since the bill exhibited, and that it is commonly granted without costs on either side.(6) But on disclaimer, if plaintiff's bill appear to be vexatious, it will be dismissed with costs.(7) When defendants on foreclosure appear and disclaim, they are entitled to costs, unless notice of the nature of the suit had been given as directed. [ante ch. 6 § 10.].(8) A defendant who disclaims may be examined as a witness for a co-defendant.(9) Where a defendant disclaims all right, and the plaintiff does not bring him to hearing, he cannot read defendant's evidence in proof of his own right to the prejudice of another defendant.(10) It seems the defendant is not absolutely stopped by his disclaimer from afterwards insisting on his claim, but he must make out a very strong case on affidavit, to allow him ever to advance a claim after such a disavowal of title.(11) Thus where defendant put in an answer amounting in the whole to a disclaimer, and afterwards being examined as a witness, by his depositions renewed his claim, *held* that he could not get rid of the disclaimer on the record, without a strong case on affidavit, and therefore he was a good witness; but defendant reading his depositions must admit that he has no interest.(12) And the defendant cannot by answer claim what by disclaimer he has declared he has no right to. If a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant; but he may answer to one part of a bill, and disclaim as to another.(13)

ANSWER.

§ 35. Answer;—kinds and qualities.

The answer must defend whatever part of a bill is not covered by demurrer, plea, or disclaimer. If a demurrer or plea has been put in separately, or jointly with an answer, which may be as hereafter mentioned, and the demurrer or plea has been overruled; [ante § 27. 30.] or if no demurrer or plea has been interposed, the defendant must answer, or suffer a decree pro confesso, or process of contempt to compel answer, or further answer as the case may be, at the election of the complainant.

(6) Newl. Wy. Pr. Reg. Grant.
(7) Harr.
(8) see 5 Cowen 547.
(11) Newl. Grant. 7 Ves. 267.
(12) ib.
(13) Newl. Mitf. see form Bla. 87 appx see 5 Cowen 547.
(9) 7 Ves. 267.
(10) 2 Atk. 39.

[ante ib. ch. 7. § 41-45. 37-39.] The answer may be in confession,(1) avoidance,(2) or denial;(3) and with regard to its qualities and requisites,(4) it must be, 1. direct and positive, or upon information and belief; 2. full; but 3. free from impertinent matter or scandal. The mode of averring and setting forth facts in answers to be verified by the oath of a party is the same as in petitions and bills. [see ch. 2. § 5-8.] In all such, the several matters stated, charged, averred, admitted or denied, must be stated positively, or upon information or belief only, according to the fact.(5) The bill, as well as the rule, requires the defendant to answer according to the best of his knowledge, remembrance, information and belief. It is not sufficient, therefore, for defendant to say, that he admits or believes, that such a particular fact or event *might* have happened; but he must state positively that either he knows, or has been informed and believes, that it did or did not happen, or that he has no knowledge, information, or belief on the subject; and he must not merely answer the several charges literally, but he must confess or traverse the *substance of each charge*. And wherever there are particular precise charges, they must be answered particularly and precisely, and not in a general manner, although the general answer may amount to a full denial of the charges.(6) The rule that an answer must be full is subject to exceptions and modifications;(7) and how far a defendant may by answer object to answer fully, has been a greatly disputed question.(8) The answer should be free from impertinence or scandal, [ch. 2. § 5.] and if defective in these respects, may as well as for insufficiency, be referred as hereafter mentioned.

§ 36. Preparing answer.

The solicitor attentive to get his client's answer put in, as early as may be, will draw it, or submit to coun-

(1) Bla. 283-9. 117-125. Eq. Draft. 388. 393. 396. 398. as to disclaimer or answer & disclaimer. see ante § 33. &c. Eq. Draft. 450-2.
(2) 14 J. 63. 20 J. 685. 17 J. 367. 366. Eq. Draft. 394. 385. 404. 389. 1 Cowen 711.
(3) Eq. Draft. 385. 394. 396-7.
(4) see 1 Hopk. 453. 20 J. 669. 18 J. 544. 555. argo. 17 J. 363. 10 J. 524. 11 J. 260. 4 J. Ch. 437. 205. 1 J. Ch. 76. 1 J. Dig. 343-6. Bla. 288-9. 119. 120. 123. form. Eq. Draft. 331.
(5) R. 18. 5 J. Ch. 247. 1 J. Ch. 103. 288. 3 J. Ch. 297.
(6) Mitf. Newl. Grant. 1 J. Ch. 65. 103.
(7) 4 J. Ch. 205. 432. 18 J. 562.
(8) See 4 Cowen 617. 618. 634. 640. Newl. 180-1. Hoff. Mr. 267-83

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sel for that purpose, *instructions* derived from his own careful perusal of the bill and personal knowledge of the case, or knowledge of facts and circumstances obtained from his client by going through the substance of the bill minutely with him. If the bill involve various and multifarious matters, especially matters of account (in which case the assistance of an accountant may be necessary,) or receipts and payments, a proportional degree of attention and care will be directed to the accuracy of the allegations, denials or statements which the solicitor will bear in mind, are to be sanctioned by the oath of his client. His object must be supposed to be to comply with the general rule, by his client's fully answering the bill, at least *substantially* and to a *common intent*, which means, such an answer as, without merely captious objections taken, must be understood in the common acceptation of language, to amount to a *reasonably* satisfactory answer to the bill.(2) This is the least he can regularly do; though in some cases, it is not easy, if practicable, to do *more*, and certainly *then not* necessary: in such instances, it may be useful to bear these distinctions in mind when before the master, should the answer be excepted to for insufficiency, and submit to him that the parts excepted to are sufficient to a common intent; and *that* may prevail over the exception, and be allowed by the master.(3) To obtain, however, complete and satisfactory information for the answer, the solicitor may find it very useful to go with his client deliberately through the bill, (its length, intricacy or importance requiring it) especially the interrogating part; but interrogatories to facts not charged need not be answered.(4) He will thereby obtain from his client, in writing separately, or perhaps in the wide margin of a brief copy of the bill, such answers, explanations, contradictions, &c. as will enable him or the counsel to draw such an answer as will not from want of proper attention and care on his part, put his client to the trouble and expense of a further answer, if exceptions should be taken: unless the purpose be to put in an insufficient answer, for the sake of gaining time. In such case, defendants sometimes put in an answer not replying at all to some charges or interrogations which

(2) Grant 105.
(3) Ib.
(4) ib. c. 1 Ves. 538.

they deem unessential to justice, and the answer, therefore, though true as far as it goes is not technically a *full* answer. This practice under particular circumstances of hardship or oppression might be deemed justifiable with a view to impede the progress of an iniquitous suit, by inducing complainant to except to an answer as insufficient for putting the cause at issue, but is entirely discountenanced by the court. An answer not full was ordered to be taken off the file as *no answer*, but merely delusive with an immediate order of reference to see if it were *substantially* an answer or not.(3) But it was afterwards decided that such an answer can only be disposed of in the regular way, by exception.(4) A false plea, however put in for delay has recently been ordered to be taken off the file, with costs to be paid by the solicitor.(5) On the other hand, some cases are of such a nature as to make it scarcely practicable for a defendant to put in an answer which, though legally sufficient, is, at the same time, satisfactorily so to a plaintiff, especially if litigiously disposed.(6) But supposing a full and complete answer be put in, it is drawn, engrossed, signed, verified, paged, endorsed, filed and served, in the manner directed for preparing and completing petitions and bills. [ante ch. 2. § 5-9. 34.] When drawn, the draft is carefully read over to, or with the client, or a copy given him for his perusal, remarks and approbation, and is then like bills and petitions to be engrossed in a fair and legible hand, in words at length, using no figures, except in the schedules of accounts. The counsel's name is not to be omitted, and is generally added where the answer is taken by commission also, though not necessary.(7) The engrossment being carefully examined and approved by the client is, together with the schedules, if any, to be signed by him. The usual mode of signing the name is sufficient. The jurat being superadded, and the answer signed by the party, and his solicitor and counsel, is sworn to by the former before the proper officer, if an oath is required.

§ 37. Drawing, engrossing and completing.

(3) Grant c. 14 Ves. 415. sed vide Eq. Draft. 612. 617.
(4) 3 Madd. 437.
(5) 1 Jacob 441.
(6) Grant.
(7) Grant see ante § 29.

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§ 38. Answers how verified; on oath, on honour, or without oath; or without oath and signature

The general rule is, that answers must be verified by the oath of the *party* defendant; or if an infant, by his guardian ad litem; if a lunatic, by his committee, &c.(8) But in England, in some, or most cases of amicable suits, and where there is every reason to be satisfied of the truth of the answers, the oath is waived, which is there permitted by the court on an order obtained by defendant, as of course, for that purpose, in case the plaintiff's clerk in court consents. Sometimes the signature too, is in like manner dispensed with, where known to be not material, and not easily obtained; especially in absence, abroad, or the like. In these instances the motion paper, if by motion, on which plaintiff's counsel applies to the court, if the application be by plaintiff, is, 'that the defendant may be at liberty to put in his answer without oath,' or 'without oath and signature,' as the case may be. The same if by petition. If defendant be in England the order is made solely on plaintiff's application; but if abroad, then his consent is necessary; but for which the usual consent brief, signed by his counsel, is sufficient. And where a defendant abroad had given a power of attorney to defend suits, the court thought it better that the answer should be filed without signature, than be signed by another person, and purporting to be the hand-writing of the defendant himself. In bill of foreclosure, defendant going abroad before answer put in, clerk in court was ordered to receive it without oath or signature.(9) So in certain cases of privileged persons in England, the *attestation of honour* is received instead of an oath, and might, it seems, on special motion be allowed in ordinary cases. In all cases where an answer is taken by signature only, that signature must be attested by defendant's solicitor, or by some other reputable witness: viz. 'signed by the above named defendant A. B., in the presence of C. D.' with addition of

(8) 7 J.Ch .557. 18 J.562. Bla.118. 50 appx.Hoff.Mr. 252. It is said a wife answering seperately must answer by guardian that there may be some one answerable for costs. Hoff. Mr. 252. citing Bunbury's Reports. Sed qu? *Bunbury* is of doubtful authority, see 5 Burr. 2658-9. see ante § 6-8. where wife applies for leave to answer seperately. Bla. 455. 45 appx. Eq. Draft 611. If the wife be an infant it seems a guardian might be necessary, see Eq. Draft 586. If the answer be by a foreigner, see authorities cited ante ch.2. § 7. p. 21.

(9) Grant 107. c. 18 Ves. 468. 10 Ves. 441. 6 Ves. 171.

§ 39. The rule as it prevails in this state; answer when not on oath, and its effect; injunction ne exeat; divorce; exceptions to such answer for scandal or impertinence; *jurat*; who authorised to administer the oath in or out of the state; separate answers; dedimus potestatem, &c.

residence.(10) The exceptions to the general rule in this state, (not but that the court might on special application, allow an answer on honour,(11) or without oath, where no waiver in the bill or without oath and signature) are as follows: where the complainant has in his bill in all cases, other than for discovery only, waived an answer on oath, [see ch. 6. § 5. 17.] the answer may be without oath and will have no other or greater force as evidence than the bill.(12) If a preliminary injunction or ne exeat is prayed for in the bill, the defendant may put in his answer on oath, for the purpose of moving thereon for a dissolution of the injunction, or discharge of the ne exeat, although an answer on oath is not required by law, or is waived by the complainant in his bill. But such answer will have no greater or other force as evidence, than the bill.(13) But an injunction or ne exeat will not be dissolved or discharged, although the whole equity of the bill is denied by the answer, unless such answer is duly verified by oath.(14) And where the complainant has waived an answer on oath, we have seen that he may counteract such application, or at least that the dissolution or discharge is not of course, but may be retained till hearing, by having annexed to his bill, in addition to the usual oath, an affidavit of a credible and disinterested witness to the material facts, as directed. [ante ch. 6. § 24.] An answer to a bill for a divorce, charging adultery, [ib. § 5.] may in all cases be without oath or affirmation.(15) So in suits against corporations.(16) The answer without oath, may be excepted to for scandal or impertinence, but not for insufficiency. But all material allegations not answered and admitted may be proved by complainant in the same manner as if they were distinctly put in issue by the answer. If no replication is filed the matters of defence in the answer will on hearing be considered admitted although the answer is not on oath.(17) The answer may be sworn to before any officer authorised to take affidavits to be read in the court, [ante ch. 2. § 7.] or before a commissioner specially authorised by the court to take such answer. If defendant reside

(10) Grant 108.
(11) See Bla. 118. see form of order that defendant answer on honour and other defendants without oath plaintiff assenting, Eq. Draft 585-6 see consent ch. 2. 31.
(12) 2 R. S. 175.
(12) R. 36.
(14) R. 37.
(15) 2 R. S. 144. § 39.
(16) 1 Paige 220. see ante § 8.
(17) R. 40.

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out of the state, it may be sworn to and authenticated in the same manner prescribed by law for taking affidavits out of this state to be used in judicial proceedings here.(18) [see ch. 2. § 7. p. 21. n.] The substance of the oath and the form of the *jurat*(19) have been prescribed. [ch. 2. § 8.] The defendants having distinct claims or defences may answer separately.(20) But separate answers unnecessarily put in by a solicitor for several defendants, or by different solicitors who are partners, are not taxable [ch. 2. § 81.]

§ 40. Dedimus potestatem to take answer.

Though the necessity of a commission to take an answer in, or out of the state, seems to be obviated in ordinary cases by the above rules of court, yet cases may occur where a special commission would be proper, both at home and abroad, and upon application would be granted. In England the *dedimus potestatem* to take defendant's answer is ordinary, or special. The first is where defendant in a country cause, and within the time allowed to answer, or before attachment issued to compel it, may pray a dedimus, termed *craving a dedimus*, and is as of course, to take his answer only, or plea only, not to plead, answer, or demurr. The special application is by petition for time, and a dedimus, where the time for the ordinary dedimus has run out, and where the defendant wishes not merely to answer only or to plead only, but "to plead, answer, or demur, not demurring alone;" which is termed a special dedimus or commission; as otherwise, should the order be to answer only, he could not plead also, though he might plead alone, nor demur, nor would the court afterwards extend the order to the usual terms; and after attachment issued, he would be allowed only commission to answer, not a special one to plead, answer, or demur. In amicable suits therefore, alone, the ordinary dedimus is there properly applicable, where defendant clearly has to answer only: in all other cases, and where other modes of meeting plaintiff's bill may possibly be resorted to, the usual application, that is by petition to the rolls is there deem-

(18) R. 41.
(19) See Hoff. Mr. 397-8. Eq. Draft 535-6.
(20) See 5 J. 412. 10 J. 412. 157. 524. 14 J 501. Bla 287. see 1 Paige 164.

ed advisable,(1) The special application is made where the defendant resides at a distance from London or is abroad, for an order for commission to take his demurrer, plea or answer and for further time,(2) and varies to the circumstances of the case, as where the application is for commission to take the separate answer of a married woman residing abroad, and to assign a guardian, she being an infant.(3) [see ante § 6. 38. n. (8) ch. 2. § 54.]

§ 41. How applied for.

The application here also, may be by petition, or by special motion,(4) founded on affidavit, notice and service, and for a regular motion day as directed. [ch. 2. § 5-15.] The affidavit(5) may be by one defendant, that his co-defendant might reside abroad. The notice(6) may give the names of two or more commissioners. The commission might it seems be directed to one person only, ante § 38.] where the plaintiff's solicitor does not nominate another for his client, to see the answer taken. One commissioner then, on each side is sufficient: more are usually named, chiefly in case of absence, or other hindrance.(7) If plaintiff's solicitor mean to see the answer taken, he will give to the opposite solicitor, two commissioner's names with directions, to which of them notice shall be given of executing the commission, and which is to be expressed on the label of the commission.(8) The notice of motion, copy of petition, if by petition, affidavit, &c. being served; on affidavit of service,(9) the motion being made, [ch. 2. § 15-34] an order(10) will be granted that the dedimus issue. The commission(11) being sealed and taken out, and the instructions(12) for executing the commission, prepared, the solicitor transmits them to his correspondent, usually a solicitor, with the engrossment of the answer, supposing it not made abroad, or already in his correspondent's hands.(13) But when a commission shall be issued to take a defendant's answer, no copy or abstract of the bill

(1) Grant 144. c. 2 P. W. 464. 16 Ves. 355. 10 Ves. 444. 3 Madd. 42.
(2) Eq. Draft. 583.
(3) Eq. Draft. 586. see 1 J. Ch. 24, 2 J. Ch. 139.
(4) See Bla. 424-431.
(5) Bla. 425.
(6) ib.
(7) Grant 145.
(8) ib.
(9) Bla. 425-6.
(10) ib. 426.
(11) ib.
(12) ib. 423.
(13) Grant. Newl.

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§ 42. How executed.

shall be annexed thereto.(14) The correspondent if he be also the acting commissioner is by the English practice to give six days notice to the complainant's commissioner, of the time and place af executing the commission, when the commission is executed in a country cause. But no notice need be given in case of ex parte commission.(15)

Should the complainant's commissioner not attend, answer must be taken by both defendant's commissioners, (that is unless the commission be directed to a single person—*ante*) although one commissioner on each side is sufficient. But two commissioners must return the dedimus.(16) The commissioners having met at the time and place appointed by the notice, the defendant attending, and his answer prepared for being sworn to, and either previously signed, or signed before the commissioners, one of the commissioners opens the commission, and pursuant to its accompanying instructions, taking the answer, interrogates the defendant thus :— "Have you read, or heard this answer read, and do you exhibit it as you answer to the bill of complaint of——?" Defendant answering in the affirmative, one of the commissioners administers, the same oath as is contained in the special jurat, [ante ch. 2. § 8.] the form of which is given in the instructions and added to the answer. If there are schedules of account, &c. copy of will to be annexed to the answer they may for greater certainty be signed by defendant, and attested by the initials of the commissioners.(17) The answer(18) thus taken is then, with the schedule, if any, annexed to the commission, and the caption, or jurat at the foot of the answer is signed by the commissioners, viz. "This (plea and answer or) answer was taken, and the above mentioned A. B. and C. D. the defendants, were each duly sworn to the truth thereof, on the Holy Evangelists, (and the demurrer of the said defendants was taken without oath, if it be so) at the house of—situate in the town of—,&c. on the—day of—in the year one thousand, &c. by virtue of the commission hereunto annexed, before us, E. F. G. H."(19)

§ 3. How returned; petition for further time and further proceedings after answer.

(14) 2 R. S. 179. § 72.
(15) Grant. see Eq. Draft. 619.
(16) Grant. Hinde.
(17) Grant.
(18) Bla. 429. 430.
(19) Grant.

The caption(19) being signed by the two commissioners who took the answer, they endorse on the commission their return, viz. 'The execution of this commission appears in a certain schedule (or schedules) hereunto annexed. E. F. G. H.' The answer, schedule, commission, and return, thus signed, are folded up and inveloped in a convenient size, bound round with tape, at the crossings of which they affix their seals, endorsing their names in the vacant spaces, having first endorsed the name of the court and title of the cause in which the complainant's name is to appear first, and direct it to the clerk, assistant register or register from whose office the commission issued, and whose name appears at the foot of it. If one of the commissioners do not personally deliver the envelop with its contents in New-York, it should be sent by some person who, on his arrival, will apprise defendant's solicitor, or the clerk, register or assistant, who, or some master before whom the bearer will be conducted, will swear to the receipt and unaltered condition of the package, viz. that he received the commission from the hands of one or more of the commissioners therein named, that it has not been opened or altered since he so received it.(20) If a commissioner bring up the answer he also must leave it in like manner, but the clerk, register, &c. merely receives it from the commissioner without oath, and so endorses it.(21) If a defendant having a commission to answer only, instead of answering, tenders a demurrer to the commissioners, they are to return his refusal to answer, and the reason thereof, with the demurrer, for the consideration of the court. But the demurrer will be filed at the peril of the defendant.(22) The answer is then opened, filed, and notice thereof given by the defendant's solicitor to the complainant's. If the commission be not returned within the time allowed, [see ante § 40.] the defendant may apply by petition for time to answer and return the dedimus ;(23) and the complainant at the same time, or when the dedimus was first applied for, may move for injunction to stay proceedings in a suit at

(19) Grant.

(20) Grant. Bla. 430. 423. But the latter part of the oath has been dispensed with, where the envelope containing the answer was in consequence of its not being properly endorsed by the commissioners, opened by mistake by defendant's solicitor. Newl.

(21) Grant. Newl.

(22) ib. Wy. Pr. Reg. Harr.

(23) Bla. 45. appx.

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6. ANSWER, PLEA AND DEMURRER.

§ 44. Answer, plea and demurrer

A defendant may demur as to part of the bill, plead as to other part, disclaim as to part, [ante § 34.]and answer as to the residue.(1) He may put in separate demurrers to separate distinct parts of the same bill, for separate and distinct causes.(2) But he cannot demur and plead, or demur and answer, both to the whole or the same part of the bill, for as answering to the same thing overrules a plea, so *a fortiori* pleading or answering to the same thing overrules a demurrer.(3) The want of letters of administration, or those from proper authority, may be shown by demurrer, plea, answer, or on hearing, though before hearing, the letters may be taken out and charged by way of supplement, or amendment.(4) The election of defences may in some instances become the subject of expediency. The question may be raised on demurrer or plea, and if overruled the defendant be permitted to answer, and the matter thus passed upon may, in some cases, be again set up by way of answer.(5) But if, upon overruling a plea of the statute of limitations to a bill for account and discovery, with an accompanying answer, the defendant be ordered to put in a *full and perfect answer*, he cannot repeat in his second answer, the same matter contained in the plea overruled, though he had matter in his second answer sufficient to sustain the defence upon the statute, but must make a full and perfect answer on the merits.(6) If the discovery sought will subject the defendant to punishment or forfeiture,(7) he is not bound to answer, for nemo tenetur, &c.(8) He

(24) see Eq. Draft. 574. 573.
(1) Eq. Draft. 425. form of answer plea and demurrer. As to disclaimer see ib. 451. 2. ante see 5 J. Ch. 184. 4 J. Ch. 294. 2 C. C. in E. 344. 1 ib. iii. 1 J. Cas. 429. 57. Bla. 96. appx.
(2) Mitf. Pl. Newl. Grant. Eq. Draft. 420. form of a several demurrer & answer, see 422. 440. Plea. and answer. Bla. 96.
(3) 6 J. Ch. 214. 2 Atk. 282. 3 P. W. 80.
(4) 4 J. Ch. 549.
(5) see 4 J. Ch. 549. 551. see 199. 4 Cowen 617.
(6) 7 J. Ch. 167. 4 Cowen 617.
(7) 4 J. Ch. 415.
(8) 1 J. Cas. 427.

may by his answer as well as by plea, protect himself from making the discovery [sed vide ch. 6. § 15.] in question, and his answer will not for want of it be deemed insufficient. So also, where the discovery would prejudice him as a purchaser for a valuable consideration without notice of the plaintiff's title.(9) But the want of notice must be shown by plea or otherwise. It is matter of defence, and must be established by proof. Defendant must deny all knowledge of facts whence notice might be inferred, and his denial must be full, positive and precise.(10) Whether a defendant who has submitted to answer, could in any other cases protect himself without a plea or demurrer from answering fully, is the disputed point(11) before referred to. [ante § 35.] In some cases it has been decided that if the defendant denies a substantive fact, upon which the plaintiff's title to relief depends, the defendant is not bound to answer further. But there are other cases in which the court has held a contrary doctrine, proceeding on the ground that the defendant ought to have resorted to the other modes of defence by demurrer or plea; and such is now the rule of the court in England.(12) And it is no ground for a defendant's not answering fully, that he is a mere witness, for he ought to have demurred or pleaded instead of submitting to answer.(13) But in all cases where the defendant must answer fully on a demurrer or plea being overruled, whether the same were separately pleaded or united with an answer, the defendant must put in and perfect his answer in the manner before pointed out, and may thereupon proceed as follows:

AFTER ANSWER AND BEFORE ISSUE.

§ 45. Proceedings after answer; first for defendant.

The proceedings will be continued, 1. for defendant 2. for complainant, until the time elapse when issue will be deemed taken on bill and answer. This, unless further time to except, be obtained, will regularly be within thirty days after the answer; the complainant having twenty days to except for insufficiency, or the answer will be deemed sufficient;(1) and if he do

(9) 2 Ves. 454. 5 Ves. 378.
(10) 1 Hopk. 48.
(11) see the opinion of Chief Justice Savage, 4 Cowen 618, &c. in error
(12) Newland 180-1, and authorities cited.
(13) ib.
(1) R. 50.

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not reply to the answer within ten days after it is deemed sufficient, the cause will stand for hearing on bill and answer and either party may notice it accordingly.(2)

1. FOR DEFENDANT.

§ 46.
1 cross bill; 2. testimony de bene esse; 3. amendment of answer, or 4. supplemental answer.

The defendant having filed and served a copy of his answer, may afterwards: 1. File a *cross bill*, or if a cross bill had been filed before answer, now proceed to compel the complainant to answer it. [see § 31-2.] 2. Apply for examination of witnesses *de bene esse*.(2) [see ch. 7 § 53.] 3. *Amend* his answer or file a *supplemental answer* on special application for leave. The withdrawal of an answer,(3) and putting in a new or further answer after exceptions, will be noticed under the complainant's proceedings. The amendment of an answer is in the discretion of the court; if in a *small* matter without notice, as in case of a fact or date mistaken, and in other cases amendments have been allowed (4) in a material point on notice and affidavit of defendant being surprised, and on payment of costs.(5) The defendant has been permitted to take his answer off the file, correct the title, and re-swear it, on undertaking to re-swear the same answer, and paying costs of motion.(6) A joint and several answer taken by commissioner, and including in the title persons who declined joining it, was ordered to be received as the answer of those who swore ot it, without striking out the other names.(7) But an answer was ordered to be taken off the file, with costs of motion, when purporting to be the joint and several answers of two defendants, though sworn by one only.(8) An answer misnaming the plaintiff,(9) or naming only five plaintiffs instead of six, has been ordered to be taken off the file.(10) But where defendant has mistaken plaintiffs' name he has been allowed to amend.(11) An answer was taken off the file where the title omitted the words "to the bill of complaint" for irregularity.(12) But, as noticed, the defendant has been allowed to correct the

(1) see R. 65. *post.*
(2) see 2 J. Ch. 146.
(3) 18 J. 566.
(4) 2 Madd. 377.
(5) see Bla. 214.
(6) 1 Madd. 269.
(7) 2 Ves. and B. 310. But see 3 Bro. C. C 399.
(8) 1 Madd. 265.
(9) 11 Ves 62.
(10) 1 Madd. 83.
(11) See Eq. Draft. 577.
(12) Coop. C. C. 249.

title and re-swear the answer. The court here, especially where the answer has not been sworn to, would probably allow amendments, on cause shown and on terms, [see ante § 25. ch. 7. § 47-8.] as well in answers as pleas, [ante § 30.] But the English rule seems now to be, that an answer is not to be amended, though it was formerly practiced, but now in case of errors, a *supplemental answer* is to be filed to correct them.(13) The cases in which a supplemental answer will, or not, be permitted are numerous, and the subject of counsel's advice. It is not readily allowed if to the prejudice of plaintiff.(14) But though allowed with great caution, yet where there is a clear mistake in an answer, which is proper to be corrected, the defendant may be permitted to file an additional or supplemental answer, but only where there is a mistake, properly speaking, in a matter of fact.(15) But leave has been given even after replication, to file a supplemental answer to a bill for dower, in order to state a fine and non-claim omitted, *through ignorance*, in the original answer.(16) A supplemental answer may be filed where defendant has since obtained an exemption of his person from imprisonment under the act. But he ought to state and avail himself of the exemption at the earliest day.(17) So, after general admission of assets, where claims had afterwards come in exceeding the assets.(18) A supplemental schedule was allowed to be put in upon petition and affidavit, stating material errors discovered in taking accounts.(19) The application is by special motion on notice, or by petition stating the supplemental matter, with an affidavit, that defendant did not know the circumstances upon which he applies or any other circumstances upon which he ought to have stated the fact otherwise,(20) and comprising the whole supplemental matter.(21) The petition, if by petition, affidavit, notice, service, affidavit of service, motion, and order are as directed. [ch. 2 § 4-35.] A brief for counsel is given, the court attended on hearing, minutes of the order prepared,(22) and attended to, to see that the whole new matter is set out, the order drawn up and served, the

§ 47
4. Supplemental answer.

(13) Grant. 109. 2. Madd. 376. 1 Bro. C. C. 419. 8 Ves. 79.
(14) 2 Ves. and B. 256.
(15) 4 J. Ch. 375. see 578. 375.
(16) 1 Simons 505.
(17) 1 Hopk. 27.
(18) 2 Madd. 377. 379.
(19) 4 Madd. 404.
(20) 10 Ves. 401.
(21) Grant 109. see 19 Ves. 630.
(22) See R. 94. ante. ch. 2 § 27.

CHAP. VIII. § 48. 5. Paying money into court.

answer prepared and taken in the usual way, and a commission issued, if necessary.(23) 5. The defendant may anticipate the motion of the complainant, as hereafter mentioned, by paying money admitted in his answer, into court; or he may await the *order* of the court on complainant's application. The party bringing money into court, *persuant to any order*, shall, in all cases be thereby discharged from all further liability, to the extent of the money so paid into court.(24) When money is directed to be paid into court, it must be paid to the register, assistant register or clerk where the payment is directed to be made, or be deposited in the proper bank to his credit, and entered in his bank book, specifying in what particular suit, or on what account, such deposit is made.(25) All money brought into court for or by any suitor, and paid to the register or assistant register, must be deposited in such banks, and accounts kept with the banks in such manner and form as the court shall direct; or if paid to a clerk, then as the vice-chancellor of the circuit shall by a general order direct.(26) The accounts of the register and assistant register, with the banks in which monies are directed to be deposited, must be kept in such a manner, that in the cash books of the banks and in the bank books of the register and assistant register, it shall appear in what particular suit, or on what account, the several items of money credited or charged were deposited or paid out.(27) No monies brought or paid into the court, and deposited in any bank to the credit of any officer of the court, can be paid out by such bank without the production of the order of the court for that purpose, authenticated by the signature of the chancellor, or vice-chancellor making such order.(28) Orders upon the banks for the payment of monies out of court must be made payable to the order of the person entitled thereto, or of his solicitor, or his attorney, duly authorised, and must specify in what particular suit, or on what account the money is to be paid out, and the time when the decree or order authorising such payment was made.(29) The chancellor, or vice-chan-

(23) Grant.
(24) 2 R. S. 171. § 21. sed vide 1 Hopk. 274. 505. and 2 Wend. 78.
(25) R. 127.
(26) 2 R. S. 171.
(27) R. 127.
(28) 2 R. S. 171-2. § 23.
(29) R. 128.

cellors respectively, may cause monies thus brought or paid in, pursuant to order, to be invested in public stock, or placed at interest on approved landed security, and from time to time be transferred or disposed of.(30) All stocks and securities taken by order of the court, for the benefit of suitors, must, if appointed to be taken in the name of any officer of the court, be taken in the name of the register, or assistant register, or of one of the clerks, who must severally keep just and full accounts of all monies, stocks and securities, that shall come to their hands by virtue of their offices, and of all payments and investments made by them;(31) and upon death, removal or resignation, the stock, mortgages, securities and money deposited in bank, vest in the successor of such officer.(32) The clerks, on the first Tuesdays of January and July, must transmit to the register, an account of monies paid in and deposited, accompanied by a certificate of the cashier that the sum total is actually in the bank to the credit of such clerk as clerk of the court, and not mingled with any other account.(33) And on the first day of every term, the register, or assistant register, as the case may be, residing in the city in which the term is held, must exhibit his bank account, and also the account kept by him, to the chancellor, for his examination.(34) 6. Where a plaintiff is proceeding for one and the same matter against defendant both at law, and in this court, or in a foreign court of law,(35) or has brought a suit and obtained a judgment,(36) or issued an execution,(37) the court, on the coming in of the answer, will put him to his election to proceed at law or in this court, and if he elect to proceed at law the bill will be dismissed with costs, but if he elect to proceed in chancery, he will be enjoined from proceedings at law.(2) The defendant may, by the English practice, after answer filed, and expiration of the eight days for filing exceptions thereto,(3) obtain an order of *course* on motion, without notice, that plaintiff,

§ 49. 6. Putting complainant to his election.

(30) 2 R. S. 171. § 21.
(31) ib. 172. § 24. R. 6. ante ch. 1. § 12.
(32) ib. § 26-27.
(33) ib. § 19.
(34) ib. 172. § 25.
(35) Grant. Newl. 1 Ves. jr. 91. 3 Ves. and B. 9.
(36) 4 J. Ch. 84.
(37) 3 J. Ch. 224.
(2) ib. see also 3 J. Ch. 416. 1 J. Dig. 355.
(3) If exceptions to answer be filed, plaintiff cannot be put upon his election till exceptions disposed of. 3 Madd. 24.

CHAP. VIII.

his attorney, &c. within eight days after service of the order, elect in which court he will proceed. If plaintiff be satisfied that he is liable to the application, he may immediately elect; but if advised that the order obtained by defendant was upon *false suggestion*, he may then move to discharge the order, on motion with notice, and if it clearly appear that the two suits are not for the same matter, the order will be discharged; but in case of difficulty, a reference to the master will be directed, and all proceedings mean time in both courts stayed.(4) But an order of reference to enquire whether proceedings at law and in equity are for the same matter, implies an order to stay proceedings, whether asked for or not, and the injunction should be inserted by the registrar, of course; but plaintiff having, after such order of reference, proceeded at law and obtained time for executing a writ of inquiry upon terms, held, that he had waived the benefit of the order.(5) Here the motion is special in the first instance, and the party is entitled to notice for a regular motion day. [ante ch. 2. § 10-15.] The reference is prosecuted in the usual manner, [ib. § 36, &c.] exceptions to the report may be taken, and ultimately either the complainant's bill will be retained or dismissed, or complainant put to his election, as the eventual result of the master's report may be. 7. The defendant may also move for a *dissolution of injunction* or *discharge of ne exeat*, on the coming in of his answer duly verified by oath, and after the lapse of the ten days limited for complainant to except to the answer. But the granting of the motion is not a matter of course; [see ante § 39.] nor will the injunction be dissolved, unless the answers of all defendants are perfected, provided they are all implicated in the same charge, and the complainant has made use of due diligence to get in their answers.(6) 8. A complainant may be compelled to produce an instrument stated in his bill to enable defendant to make a full defence. In such case where it is plainly necessary the court will give time to answer until after it is produced.(7) And if after a sufficient time elapsed, the complainant neglect to produce the instrument, the court may grant an order that he produce it by a given day,

§ 50. 7. Dissolving injunction or discharging ne exeat.

§ 51. 8. Motion for production of papers referred to in bill.

(4) Grant c. 3 Ves. & B. 9. 1 Jac. and W. 450. 2 Madd. 395.

(5) 1 Jacob. 530. as to injunction to restrain suit at law, see ch. 2. § 23. 25.

(6) 1 Paige 164.

(7) 2 Sim. and Stu. 242.

or the bill be dismissed with costs.(8) But the production of papers after answer was denied, where complainant had not stated in the bill that he was in possession of them.(9)

2 FOR COMPLAINANT.

§ 52. 1. Amendment of bill after answer or filing a supplemental bill, &c.

1. The complainant may amend his bill of course, after answer, at any time before he replies thereto, until the time for replying expires, and without costs if a new or further answer is not thereby rendered necessary; but if such amendment requires a new or a further answer, then it shall be on payment of costs to be taxed. But no amendment to a bill which has been sworn to shall be allowed, except by special leave of the court granted after notice to the opposite party. No amendment shall be considered as made until service thereof, if service of the pleading amended was necessary.(1) And in all cases if a further answer be necessary, the defendant will have the same time to answer as he originally had.(2) Or if no amendment suffice, a supplemental bill may be allowed to be filed, or the suit on death of a party be revived, or a revivor and supplement be filed as before directed. [ch. 7. § 47-53. ch. 8 § 25. 30.]

§ 53. 2. Motion for production of papers referred to in answer.

2. The defendant may be ordered to *produce* books and papers,(3) deeds or writings referred to in his answer,(4) for inspection of complainant. As where a suit is brought by a principal against an agent, the latter may be ordered to produce books of account.(5) But upon a bill to set aside a conveyance alleged to have been obtained by fraud, which was wholly denied, the court refused on motion to compel the defendant to produce the purchase deed.(6) The proper order, in

(8) 2 Wilson Ch. R. 29.
(9) 2 Wils. Ch. R. 61. R. 167. *post.*
(1) R. 43. see further, 5. J. Ch. 505. Bla. 210, 211. 272. 293. 43 ap. 1 J. Dig. 352-3. 1 Paige 124. Eq. Draft. 556. n. 574-6. Where no further answer required and plaintiff amends defendant's copy. Eq. Draft. 576. see 3 J. Ch. 410. Amendment by adding new defendants, ib. 577-8. see 3 J. Ch. 410. or on payment of costs to some defendants & without costs as to others, requiring from the latter no further answer. Eq. Draft. 578. A bill may be amended by adding plaintiffs notwithstanding the defendants have answered it. 1 Simons 500.
(2) R. 45.
(3) 1 Wilson Ch. R. 184. 190. 222.
(4) Bla. 458.
(5) 1 Wils. Ch. R. 222.
(6) 2 Sim. and Stu. 309.

case of books of account would be where there is no affidavit that the books are in daily use, that the defendant produce and leave them with one of the officers of the court (in England his clerk in court) sealing up those parts which do not relate to plaintiff, and pledging himself by affidavit not to seal up any thing that does relate to plaintiff.(7) 3. The complainant may also move that defendant *pay money* into court,(8) [see ante §.] If the defendants or any of them are charged with monies for which they ought to account, and their answers show considerable property to be in their hands, beyond a reasonable sum to answer their own probable costs and expenses, and which they ought to pay into court; or if, in the public funds, to *transfer* into the name of the proper officer of the court, the court will on motion, with notice, order it to be paid in, or transferred accordingly; (9) and if the order be disobeyed, it may upon special application be enforced by attachment;(10) [see also ch. 2. § 64. ch. 7. § 6. 37.] which in this case is not a bailable process.(11)

§ 54. 3. Motion for payment of money into court, or for transfer of stock.

EXCEPTIONS TO ANSWER.

§ 55. 4. Exceptions to answer.

4. The first point usually to be determined on receiving the defendant's answer is, if the bill be fully and *sufficiently answered*, and the answer free from *scandalous* or *impertinent* matter. For an answer may be referred by complainant as well as a bill by defendant. [ante § 15.] On this subject the solicitor himself, who is presumed to be intimately acquainted with his client's case, will naturally form his own opinion, though perhaps not in important and difficult cases, feel justified in relying upon it, unsanctioned by that of counsel. After having, therefore, made his own remarks, he will most probably lay the *pleadings*, or brief of the bill and answer or answers, before counsel to advise if the bill be sufficiently answered, and on further proceedings, and to amend, if

(7) 1 Wils. Ch. R. 222.
(8) Bla 454-5. where money may be ordered. See 1 Hopk. 274. 505. 117. 306. 2. Wend. 78. when not 1 Hopk. 117.
(9) Grant. see 3 Bro. C. C. 365. 19 Ves. 117.
(10) See rules appx. No. 2. see 2 R. S. 534-540.
(11) Grant. c. Gill. Rep. 84. 11 Ves. 170.

necessary. In this brief, it is generally proper to insert the *interrogatories* at length, for the purpose of rendering the examination of the answer, for detection of insufficiency, the more effective.(7) If amendment or a supplemental bill be not advised, but that the answer be excepted to for scandal, impertinence or insufficiency the proceedings will be accordingly. In England the answer for scandal or impertinence is *referred*, but for insufficiency *excepted* to. But in this state, *exceptions*(8) to any pleading, must be taken in the same manner as exceptions to an answer for insufficiency, and may be submitted to in like manner, and within the same time. If they are not submitted to, the party excepting must refer them in the same manner, or they will be considered as abandoned; and if such exceptions are to an answer, the answer thenceforth will be deemed sufficient.(9) Exceptions to an answer will not prevent the dissolution of an injunction or the discharge of a ne exeat, unless they are filed and served within ten days after the answer is put in. If exceptions are taken, the defendant may give a written consent that they be forthwith referred; and unless the complainant procure the master's report in favor of the exceptions within ten days after receiving such consent, the exceptions shall not prevent the dissolution of the injunction, or the discharge of the ne exeat. The same practice shall be observed in referring a second or third answer on the old exceptions.(10) If exceptions are filed within the time prescribed by the last rule, it shall not be in order to move for a dissolution of the injunction or ne exeat on bill and answer, until the time for procuring the master's report has expired, unless a report against the validity of the exceptions is sooner obtained.(11) In all other cases the complainant will have twenty days after the defendant's answer has been put in, to except to the same; at the expiration of which time, if no exceptions are taken, and no order for further time has been granted, the answer shall be deemed sufficient. And if the complainant excepts to the answer for insufficiency, the de-

§ 56. Effect as to injunction or ne exeat time to except; notice of submitting.

(7) Grant.
(8) See as to exceptions, ante ch. 2. § 5. 7. ch. 8. § 15-20. 35-36. Blake 121. 285 to 302. Hoff. Mr. 253 to 312. as to insufficiency; and ib. 312-336. as to scandal and impertinence.
(9) R. 53.
(10) R. 38.
(11) R. 39.

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fendant may, within eight days thereafter, give a written notice of his submission to answer any or all of such exceptions; and he shall be liable for the costs of the exceptions which he submits to answer.(12) Further time to except to an answer, not exceeding twenty days, may be granted on application, and sufficient cause shown by affidavit to a vice-chancellor or injunction master, and on such terms and conditions as he may direct. But no such order for time shall be granted by an injunction master, or by a vice-chancellor out of court, after the time for excepting has expired, or where time has before been granted by order of the court, or by a vice-chancellor or master, or by the agreement of the opposite party.(13) But the court upon special cause shown, may extend the time for putting in or serving any exceptions.(4) The exceptions(15) are prepared, signed by counsel(16) filed and served in the manner before pointed out in the analogous case of exceptions to bill. [ante § 16.] The defendant it has been seen, has his election either to *submit*.(17) that is, in case of scandal, &c. to allow the matter to be expunged and pay costs of the exception, or in case of insufficiency, to answer the points excepted; or discuss them before the master, and also on his report upon exceptions thereto before the court. If defendant *submit*, [ante § 17.] he will within the time give notice accordingly as above directed. If the submission be to exceptions for scandal or impertinence he may, on filing the notice of submission, have an order of course that the proper officer of the court expunge the matter, and for costs or attachment as directed, [ante § 20] and as hereafter mentioned after the report of the master. On exceptions to an answer for insufficiency, if all the exceptions are submitted to by the defendant, or a part are submitted to, and the rest are abandoned, or are disallowed on reference, the complainant may have an order of course that the defendant put in a further an-

§ 57. Submission; amendment of bill.

(12) R. 50.
(13) R. 125. see Eq. Draft. 579.
(14) R. 126 see 4 J Ch. 505.
(15) See form. Bla 296. see 19 J. 499. form for insufficiency, Hoff. Mr. 399. No 76. words of course preceding exceptions, Eq. Draft. 12. Bla. 121, 122. 286. 287. 290
(16) Exceptions to an answer must be signed by counsel. If not signed, they may be taken off the file, though defendant had taken an office copy of them, and the plaintiff had obtained an order of reference. 1 Jacob. 223.
(17) See Bla. 286. 291.

swer within twenty days after notice of the order, and pay the costs of the exceptions, or that an attachment issue against the defendant, or that the bill be taken as confessed, at the election of the complainant. And the subpœna for a better answer and for costs is abolished. (18) If the exceptions be submitted to, the complainant may amend. Where the bill has not been sworn to, if the answer is excepted to as insufficient, and the defendant submits to answer further, or the answer on reference is found insufficient, the complainant may amend his bill of course, and without costs, at any time within ten days after the defendant submits to answer any of the exceptions, or after confirmation of the master's report, if the defendant does not submit to answer any of the exceptions; and the defendant shall answer the amendments and exceptions together. And in all cases where the complainant is permitted to amend his bill, if the answer has not been put in, or a further answer is necessary, the defendant shall have the same time to answer after such amendment as he originally had.(19) Orders of course, to amend the bill, are common orders.(20) [see ch. 2. § 27-28. ch. 7. §47.]

§ 58. Reference of exceptions.

If any exceptions are not submitted to within the time prescribed, the complainant, at any time within ten days thereafter, may have an order of course to refer the exceptions not submitted to, or such of them as he may think proper. Every exception not submitted to, and which is not referred within the time specified, shall be considered as abandoned; and the answer as to such exceptions shall be deemed sufficient.(21) The rule, as before observed, applies to exceptions for scandal and impertinence as well as insufficiency.(22) The order for reference, and the reference(23) are as directed. [ante § 17-19. ch. 2. § 32-36, &c.] Whenever an answer or other pleading or proceeding is referred for insufficiency, scandal, or impertinence, the exceptions shall be considered as abandoned, if the party obtaining the re-

(18) R. 58. see Bla. 291.
(19) R. 45.
(20) R. 46. As to amendment of bill after exceptions, &c. see 4. J. Ch. 505. 549. 1 J. Dig. 352-3. Bla 211. 291-2-3. Hoff. Mr. 303-8. Eq. Draft. 578. 576. withdrawal of answer on petition for putting in a new or further answer, or filing a cross bill. See 18 J. 566.
(21) R. 51. R. 50. *ante*
(22) R. 53.
(23) see also Bla. 290-2. 297. 229. 291. 228. Hoff. Mr. 253-4. 302. Eq. Draft. 579, 580.

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ference shall not procure and file the master's report within twenty days from the date of the order of reference, unless the master shall, within that time, certify that a further time, to be inserted in his certificate, is necessary to enable him to make a satisfactory report; in which case the exceptions shall be considered as abandoned, if the report be not obtained within the further time so stated. And if the exceptions were to an answer, it shall thenceforth be deemed sufficient.(24) In deciding on the sufficiency of the answer, the master must take into consideration the relevancy or materiality of the statement or question referred to in the exception. [see ch. 2. § 49.] If on a reference of exceptions to answer, or the reference of a second answer on the old exceptions, the master shall find the answer insufficient, he shall fix the time for putting in a further answer, and specify the same in his report (25) The master's report on exceptions shall be delivered to the party obtaining the reference, who shall forthwith file the same in the proper office; and if he do not except to the report within eight days thereafter, it shall become absolute as against him. But the adverse party shall have eight days after service of notice of filing the report to except to the same; and if he do not except within that time, it shall become absolute as against him without any order for that purpose. If none of the exceptions to an answer are submitted to by the defendant, or allowed by the master, the answer shall be deemed sufficient from the time such report becomes absolute as against the complainant.(26) If the master report that any thing contained in any pleading or proceeding is scandalous or impertinent, the party excepting, on filing proof that the report has become absolute against the adverse party, may have an order of course that the proper officer of the court expunge the scandalous or impertinent matter; and that the adverse party pay the costs of the exceptions and the proceedings thereon, within twenty days after service of a copy of such order and of the taxed bill, on him or his solicitor, or that an attachment issue

§ 59. Report; time allowed to except to report; proceedings on report becoming absolute; expunging; costs; further answer; amendment of bill and answer to exceptions and amendments.

(24) R. 54.
(25) R. 55.
(26) R. 56. As to report see also, ante ch. 2. § 49-53. 1 Hopk. 9. 1 J. Dig. 356. &c. 363, &c. 4 J. Ch. 434. Hoff. Mr. 253-9, &c. 314. 400. appx. Bla. 291. 278-9.

against him.(27) If the sufficiency of the exceptions is found against defendant, the complainant may now also, as when defendant had submitted, [ante §57.] amend his bill, and the defendant who, however, will have the original time, must answer the amended bill and exceptions together.(28) We have seen that on exceptions to an answer for insufficiency, if all the exceptions are submitted to by the defendant, or a part are submitted to, and the rest are abandoned, or are disallowed on reference, the complainant may have an order of course that the defendant put in a further answer within twenty days after notice of the order, and pay the costs of the exceptions, or that an attachment issue against the defendant, or that the bill be taken as confessed, at the election of the complainant. And the subpœna for a better answer and for costs is abolished.(29) And if, on a reference of exceptions, or the reference of a second answer upon the old exceptions, the answer is found insufficient, and the master's report has become absolute against the defendant, the complainant may have a similar order of course to put in a further answer, and pay the costs within the time specified in the master's report.(30) In the cases specified in the two preceding rules, the defendant shall be entitled to a copy of the taxed bill of costs at least ten days before the time for putting in the further answer expires, or he may put in such answer without paying the costs. But the complainant may afterwards proceed by attachment to compel payment thereof, if they are not paid within twenty days after service of a copy of the taxed bill on the defendant or his solicitor. And if the complainant has amended his bill, so as to require an answer to the amendments as well as to the exceptions, the defendant shall have the same time to answer the

(27) R. 57. see mode of proceeding to expunge, ante ch. 8. § 20.—Hoff. Mr. 314-16.

(28) R. 45. As to subp. for better answer, see Bla. 291. 294. 4 J. Ch. 434. Exceptions to an answer having been allowed, plaintiff obtained an order to amend, and for defendant to answer the exceptions and amendments at the same time defendant put in an answer to the amended bill only. The plaintiff then issued an attachment. Held that it was irregular, and that he ought to have moved to take the second answer off the file, or if he desired, to keep it on file, move specially for permission to issue an attachment to enforce an answer to the exceptions. 1 Simons 11.

(29) R. 58.

(30) R. 59.

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amendments and exceptions together as he originally had to answer the bill; and the order to answer shall be varied accordingly.(31) If the defendant do not put in a further answer and pay the costs within the time prescribed, or within such further time as may be allowed by the court for that purpose, the complainant, on filing an affidavit showing such default, may have an order of course to take the bill as confessed, or for an attachment against the defendant, as the original order may be.(32) But when exceptions are taken to an answer for insufficiency, or to any pleading or proceeding for scandal or impertinence, the party excepting shall only be entitled to the costs of the exceptions which are submitted to, and those which are finally allowed, after reference, to a master; and no part of the costs of a reference shall be allowed to the party obtaining such reference, unless the major part of the exceptions referred are finally allowed; but if any of the exceptions referred are sustained, the adverse party shall not be entitled to costs on the reference. The costs on exceptions shall not be taxed until all the exceptions are submitted to, abandoned, allowed or finally disposed of; and then the whole costs to which the exceptant is entitled shall be included in one bill, and the adverse party may offset any costs to which he is entitled.(33) If the defendant answer,(34) and his answer be insufficient, it may be referred back upon the original exceptions. The bill, answer and old exceptions are referred back, unless complainant had amended, then the new exceptions and old, and answer also to amendments. But new exceptions as to any thing in the original bill cannot, it is said, be taken after amendment, unless they are so blended with the facts in the original as to be inseparable.(35) If a complainant refers a second or third answer for insufficiency on the old exceptions, the particular exceptions to which he requires a further answer, shall be stated in the order of reference. And if he do not refer such second or third answer for insufficiency within ten days after the same is put in, such answer shall be deemed sufficient.(36)

§ 60. If no further answer; pro confesso, or attachment; costs.

§ 61. 2d answer & exceptions & reference of 2d or 3d answer for insufficiency.

(31) R. 60.
(32) R. 61. see also, 1 Hopk. 595. As to order for further time to answer, &c. and as to attachment, see *ante*. See Bla. 295. Eq. Draft. 577.
(33) R. 63. 1 Paige 138.
(34) see answer after exceptions allowed to former answer. Eq. Draft. 406. words of course to an answer after exceptions. ib. 12.
(35) see Bla. 93-5. Hoff. Mr. 303, &c.
(36) Rule 52. 1 J. Ch. 383.

The master on the reference also will fix the time in his report for further answer. [ante § 59.] The report is delivered to the party obtaining the reference, and becomes absolute if not excepted to, as directed. [ib.] The complainant has also the like order of course for further answer and costs as mentioned, [§ 59, 60.] and upon the conditions precribed.

§ 62.

If a third answer is reported insufficient on the original exceptions, and the master's report has become absolute, the complainant, on filing an affidavit of the facts, may have an order of course for an attachment against the defendant, and he shall be examined upon interrogatories to the points reported insufficient, and shall stand committed until he shall have answered such interrogatories to the satisfaction of the master, and paid the costs incurred by reason of his default. If the defendant cannot be arrested on the attachment, and shall not surrender himself thereon within twenty days after notice to him or his solicitor of the issuing thereof, or within such further time as may be allowed him by the court, or being arrested on such attachment, if he shall neglect or refuse to answer the interrogatories to the satisfaction of the master, the complainant, on filing an affidavit of the facts, may have an order of course to take the bill as confessed; and the defendant may be further punished for the contempt, in the discretion of the court.(3) The interrogatories are to be settled by the master, and must go directly to the points to which the exceptions are sustained. The defendant, instead of putting in a written examination to the interrogatories, is to be examined personally upon them by the master.(4) If pro confesso be taken, the complainant proceeds to perfect his claim, and enforce it as in other cases. [But see ch. 7. § 44.] But process of contempt may be issued to sequestration.(5)

If a third answer is reported insufficient the defendant may be attached.

And if defendant cannot be arrested, bill may be taken as confessed.

(3) R. 64. see ante § as to attachment. See Eq. Draft. 588. 610. order for commitment, see Bla. 293-4.

(4) 1 Turner and Russell R. 184. 193. n.

(5) 3 P. W. 240.

CHAP. VIII.

EXCEPTIONS TO REPORT ON EXCEPTIONS TO ANSWER.

§ 63. Exceptions to master's report on exceptions to answer.

On exceptions to master's report, the parties shall be confined to the objections taken before the master.(6) Hence, if either party neglect to appear and argue the exceptions before the master, such party cannot afterwards be permitted to bring them before the court by exceptions to the report of the master.(7) The general rule is also, that where the master shall have prepared the draft of his report, he must assign a time and place for the parties to bring in objections, [ante ch. 2. § 52.] and if they neglect to do so, they cannot afterwards except. But as on a reference to exceptions to an answer, the master makes no draft of his report(8) to ground objections. [see ch. 2. § 52.] but the whole matter is argued before him in the first instance, and the objections then distinctly made and urged upon his consideration.(9) His report might, therefore, in this case, be excepted to without previously delivering in objections.(10) The *exceptions*(11) are in the nature of special demurrers, and the party objecting must lay his finger on the error;—otherwise the part not pointed out by the exception *will* be taken to be admitted.(12) Where the plaintiff complained that a particular interrogatory was not answered, it was held that he must state the interrogatory in terms, and cannot impose upon the court the trouble whether the varied expressions of the interrogatory and the exceptions are to be reconciled; but if the defendant has submitted to answer, and his further answer is referred back, he is to object to the form of the objections.(13)

§ 64. Time for excepting, and proceedings hereon.

The period for excepting, though indefinite unless one of the parties enters an order nisi for confirming the report,(14) [but see ch. 2. § 53.] is in that case limited,

(6) R. 106.
(7) 1 Paige 145-6.
(8) 1 Paige 146.
(9) ib.
(10) see Bla. 257. 223. 2 J. Ch. 495. ib. But see 3 J. Ch. 78.
(11) see Bla. 299 270. 294-5. 268. Eq. Draft. 13, 14.
(12) 6 J. Ch. 566.
(13) 2 Sim. and Stu. 236.
(14) 4 J. Ch. 434, 445. Bla. 294. 5. Exceptions to the master's report of impertinence may, by the English practice, regularly be filed after the order to expunge, and at any time before the impertinent

[ante §] On taking exceptions, the party excepting is not bound either to make a deposite or set down the exceptions to be argued.(15) Either party may notice the same for hearing.(16) The exceptions are filed with the proper officer, [ch. 2. § 34.] copy served, [ch. 7. § 43. ch. 2. § 10.] noticed for argument, for the time, and brought to bearing(17) in the manner directed in other cases. [see ante § 25. 30.] But the argument of exceptions to a master's report on exceptions, shall now be heard as a special motion. [see ch. 2. § 10. 14, 15, &c.] Either party as observed may notice the same for hearing, and the party excepting to the report must furnish the necessary papers (viz. copies of the order of reference, report and exceptions,(18) for the court; and if he neglect to do so the report may be confirmed. But if both parties have excepted to the report, each must furnish copies of his own exceptions, and the party obtaining the reference must furnish such other papers as may be necessary.(19) The exceptions being argued and allowed defendant then will be ordered to pay the costs and put in better answer, which will be enforced, or a decree pro confesso taken(20) in the manner before directed [§ 60.] and the costs collected as also directed. [see ch. 2. § 21.]

BILL AND ANSWER.

§ 66. Proceedings on bill and answer; when a replication should be filed, or when the cause may be set down on bill and answer.

The defendant having put in and perfected his answer, freed from all exceptions, the complainant may, if he find enough confessed to ground a decree, proceed to the hearing on the bill and answer without replication or examination of witnesses, but the answer will then be taken as true in all its points.(21) It is important therefore, at this stage of the proceeding, to compare carefully the answer with the bill in order to determine whether to go to a hearing upon bill and answer, or proceed to a replication and proofs as pointed out in the next chapter. If the answer is responsive to the bill, and within the discovery

matter is actually expunged. 1 Simons, 17.

(15) 1 Hopk. 98. see Eq. Draft. 580. order to stay proceedings, ib. and Bla. 58. appx.

(16) R. 62. 1 Hopk. 98.

(17) See Bla. 271-274-5. 295. 269. 280-1. 278-9.

(18) R. 93.

(19) R. 62.

(20) Grant. see Bla. 295.

(21) 7 J. Ch. 217.

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sought, it is legal evidence in all cases, and this whether it be a denial of some fact alleged by the complainant, or whether it sets up a fact by way of avoidance merely.(22) An answer to a bill charging fraud, responsive to the bill, denying the charge, and uncontradicted by evidence, rebuts the idea of fraud.(23) In such cases therefore, where the defendant contradicts the bill or sets up new matter, the complainant must support his own allegations, and deny those of the defendant by a replication.(24) He is therefore now (though he may afterwards withdraw the replication and amend as shown in the next chapter) to determine whether there is sufficient admitted in the answer to ground a decree, or whether if he should reply, he is prepared with the requisite proof. He must in this case counteract the defendant's oath where the answer is sworn to, by proof, and by two witnesses, or by one and circumstances. But where defendant only denies a fact charged in the bill according to the best of his knowledge and belief, a single witness on the part of complainant would be sufficient to establish the fact,(25) and where the complainant had waived an answer on oath, the answer would have no greater weight as evidence than the bill. [ante § 39.] The *execution* of deeds not admitted in the answer may be proved at the hearing; but if a fact, independent of the execution, as insanity, death of subscribing witness, is to be shown, the complainant should go to his replication and proof.(26).

§ 66. Reference of course or special before hearing.

In foreclosure, [ch. 7. § 16.] where the answer admits the bill, or upon a general answer of an infant by guardian,(27) or in partition [ch. 5. §. 29.] where the rights and interests of the several parties as stated in the bill are not denied or contested; or if infant defendant in that case has put in the usual answer by guardian,(28) [ante ch. 5. § 35-6.] reference of course as upon taking the bill as confessed, may be had preparatory to setting down the cause for hearing; or in other cases, as divorces or specific performance, [ch. 7. § 13. 26. 30.] a *special* order may on motion be obtained. In divorce, if the adultery charged be admitted by the

(22) 1 Cowen, 711. see Mr. Emmet's argument in note (a) 1 Cowen, 744. see 14. J. 63. 1 J. Dig. 346.
(23) 1 Wend. 583.
(24) 19 J. 505. 14 J. 501. Bla. 126. 122.
(25) 1 Paige 210.
(26) see Bla. 154-5.
(27) R. 134.
(28) R. 177. 176.

answer, or where the bill is taken as confessed [ch. 7. § 26.] the court must refer the matter to a master, with directions to take proofs of the facts charged, and to report the same to the court with his opinion thereon; and the cause must be heard on such proof and report before any final decree be pronounced.(29) In such case, or where the bill is to obtain a limited divorce, or sentence of nullity, and the facts charged therein are admitted by the answer [or taken as confessed, ante ib.] the complainant may apply to the court, on any regular motion day or in term, upon the bill and answer, for a reference to a master to take proof of all the material facts charged in the bill, and to report such proof to the court, with his opinion thereon.(30) But to obtain such order the application must be severally supported by affidavits,(31) as directed.[ch. 7. § 26-27.] So in a bill for specific performance where the contract is admitted, on the coming in of the answer, a motion may be made for a reference of title, and if the performance of the contract is resisted on other grounds, the court will look into the answer, to see whether those other grounds are substantial or frivolous.(32).

§ 67. Reference before hearing; how conducted.

In all such cases where a reference is had before hearing, whether on an order of course or special, the hearing of the cause must necessarily be delayed until after the reference, and until exceptions, if any taken, to the report of the master be disposed of. The references in those cases are like those where the bill had been taken as confessed. [ch. 7. § 13-16. 26, 27. 30.] The general rules as to references(33) are as noticed. [ch. 2. § 36-53.] The proceedings before the master, summonses, speeding the reference regulation of the proceedings, issuing a commission on master's certificate, [ib. § 42.] for examination of witnesses abroad, or at a distance,(34) ex parte proceeding and opening it for review, [ib. § 45.] examination [ib. § 46-50.] viva voce or upon interrogatories or both, [ib. § 46. 50.] of

(29) 2 R. S. 145.
(30) R. 164.
(31) R. 165.
(32) 1 Turner and Russell R. 78.
(33) see Bla. 220-1, &c. Hoff. Mr. 1 J. Dig. 363, &c.
(34) Bla. 251. 52. appx. Hoff. Mr. 49-51, &c. 352-3. Eq. Draft. 613-14. 605.

CHAP. VIII. parties,(35) or witnesses,(36) argument before master and his report,(37) [ib. § 51-3.] may be seen in detail in other treatises. The master having prepared the draft of his report, delivered copies, and assigned a day for the parties to bring in objections, and issued his summons or warrant accordingly, [ib. ch. 2. § 52.] the *objections*,(38) if any, are filed and served, and heard on the return day of the summons, or other day then assigned. The report is then filed, and an order nisi of course may be entered, and will become absolute of course in eight days, unless exceptions be taken, as directed. [ib. § 53.]

EXCEPTIONS TO REPORT.

Exceptions to report on reference.

If exceptions be taken within the eight days, that is, on the presumption that an order nisi had been entered, and the exceptions be not to the whole report, an order of course may be entered to confirm the report so far as the same is not excepted to.(1) [ib. § 53.] Both parties may except.(2) The exceptions(3) are drawn, filed and served, as upon master's report on exceptions to answer. [§ 63.] But there are in other respects marked peculiarities. In the present instance the objections to ground the exceptions must have been previously taken as above directed. [see § ib.] The exceptions follow in substance the objections so taken, and are limited to those objections.(4) [see § ib.] In the present instance also, the argument is brought on as in ordinary cases, and as presently mentioned in the usual proceedings to hearing on

(35) Hoff. Mr. 13-36. 340-6. Bla. 230-9. 284. 105. appx. 1 Hopk. 229. 1 J. Dig. 356-7, &c. 363, &c. Eq. Draft. 12-13. 498. 520. 508. 570. 498. 512. 516, 517. 628. examining partners, 481–2. 541. 544-8. 550. 503. 569. 535. 508. Examining *pro interesse suo*. Eq. Draft. 571. examining a party as a witness. Hoff. Mr. 18-20. Eq. Draft. 490. 554. examining a wife to take her consent to waive her equity. Clancey's rights of women. appx. 627-9. Eq. Draft. 605.

(36) Bla. 248-52, 253. 284. and appx. 99. 101. 103-8. Hoff. Mr. 325-336. 33, 34. 40-63. 346-7, 340. 56, 57-60. 351-4. Eq. Draft. 613-14. 1 J. Dig. 356-7, &c. 363, &c. 228. 1 Hopk. 453. 471. 229. 45.

(37) Bla. 255. Hoff. Mr. 255-8.

(38) see 7 J. Ch. 137. 3 J. Ch. 78. Hoff. Mr. 358 Bla. 261-3. 256-7. 255-8.

(1) R. 110 109. see Bla. 266-8. 263.

(2) see 20 J. 674. 677. 681.

(3) see 4. J. Ch. 445. 303. 7 J. Ch. 137. 5 J. Ch. 441. 6 J. Ch. 566. 1 Hopk. 364. 5 Cowen 714. 1 J. Dig. 356-9, &c. 361, &c. 365, 366. see Bla. 268-283.

(4) 3 J. Ch. 78. 5 J. Ch. 441.

bill and answer, and may be set down and brought on upon the exceptions to the report, and for further directions at the same time, as presently mentioned. Notice for hearing and notes of issue are served, points and papers furnished,(5) [see § 64.] and the cause placed on the calendar in the class to which it belonged before the reference and according to its priority as it then existed.(6) Where a master, by his report, certifies a fact, and exceptions are taken to the report, it lies upon those who are to uphold the report, to produce the evidence of the fact. So if he certifies the result of an account upon the allowance or disallowance of *items* in dispute, and one of the parties excepts to the report, both as to the principle on which the account is taken, and the evidence in support of the allowance or disallowance of the *items*, the parties in whose favour the report is made, must produce the evidence on the hearing of the exceptions.(7) If any(8) of the exceptions be allowed, the order will be that it be referred to the master to *review* his report. On this order, when drawn, entered, served, and left with the master, as in other cases, [see ch. 2. § 27-36.] the usual proceedings on summonses or warrants must be had; and after being again attended on, and the report settled, the master signs and files it, and the same mode is followed, as in the first instance, for its confirmation; after which the cause will be again set down for the court's further directions on the report. But if the cause had been set down for further directions along with the exceptions, then, if the latter be overruled, the further directions are given immediately, and thus much time is saved; and it is therefore, frequently an object with one or other, if not both of the parties, that such course be adopted.(9) But if any of the exceptions are allowed, the report is sent back to be reviewed as mentioned, and the course taken as directed, and the cause again noticed for hearing and brought on for final decree. But on exceptions to a report, a feigned issue might be awarded, for instance to a report on title,(10) and the cause therefore would be delayed, until trial of the feigned issue, and then set down, as in such cases, for further directions, or upon the equity reserved, as mentioned.

§ 69.] Setting down cause on exceptions, and for further directions; decree thereon, feigned issue on exceptions setting down on equity reserved; final decree, &c.

(5) R. 93.
(6) R. 91.
(7) 1 Bligh's New Rep. 595.
(8) see Bla. 276. 275-8.
(9) Grant. 231. see Bla. 276. 278-283. Eq. Draft. 614. 656-8.
(10) See 5 Cowen 714. Bla. 374.

CHAP. VIII. [ch. 2. § 54, 55.] The further directions might require ulterior measures, and the decree therefore, be interlocutory as for reference, [see ch. 7. § 15. 14.] if none had preceded the hearing, and the decree upon the equity reserved might still be suspended by rehearing [ch. 2 § 56.] or appeal, [ib. § 52, &c.] after which a *final decree*(11) might be obtained, costs taxed, [ib. § 80.] decree enrolled and docketed, the docket transmitted to the clerks of the supreme court, [ib. § 83.] and if necessary, execution be issued, until final satisfaction obtained, [ib. § 84.] and the lien cancelled of record. [ib. see ch. 5. § 37, 38. 45. 47, 48. ch. 7. § 14-30.]

PREPARING FOR HEARING.

§70. Bill and answer, report and proofs; preparatory to hearing; notice note of issue.

But if the progress of the suit has not been thus interrupted by exceptions to report, feigned issue, rehearing or appeal, the cause is set down for hearing on the bill and answer simply, or upon report and proofs, where a reference has been had as directed, before hearing. Where the cause stands for hearing on bill and answer against part of the defendants, if the complainant do not use due diligence in proceeding against the other defendants, any of those who have perfected their answer may apply to dismiss the bill for want of prosecution; and on such application, further time shall not be allowed to the complainant of course without any excuse shown for the delay.(1) The preparatory steps to hearing,(2) are as follows: The cause, if within the jurisdiction of a vice-cancellor, [see ch. 1. § 3.] must be noticed for hearing before him, but upon application to the chancellor he may direct the hearing before himself; or the hearing and decision of any cause set down for hearing before the chancellor may be referred by his order to any vice-chancellor, subject to the appellate jurisdiction of the chancellor.(3) [ante ch. 1. § 5. ch. 2. § 26. ch. 6. § 35.]

(11) a final decree, see ante ch. 2. § 83. 1 J. Dig. 366, &c. Bla 281. 163. Eq. Draft. 640-658.

(1) R. 66. see former rules and practice in dismissing for want of prosecution. Bla. 218. and 47. appx. 219. and 28 appx. 1 Hopk. 86.

(2) see former practice in setting down cause, order, notice, case, certified office copies of pleadings. &c. Bla. 121-5. 158-62.—3 J. Ch 632.

(3) 2 R. S. 169. § 4.

The notice for hearing is for the same time, (and double time if upon an agent or by affixing) and must be served in the same manner as directed for petitions and special motions, [ch. 2. § 10-15.] rehearing, [ib. § 59-60.] or appeal, [ib. § 69.] or for hearing on taking the bill as confessed, [ch. 7. § 14, 15, 16. 27.] or of argument upon demurrer or plea. [ch. 8. § 25. 30.) It is not necessary in any case to obtain an order to set a cause down for hearing, but when a cause is in readiness for hearing, on plea, or demurrer, bill and answer, pleadings and proofs, exceptions to a master's report, or on the equity reserved, or on appeal from the decree of a vice-chancellor, or the sentence or decree of a surrogate, either party may notice the same for hearing, and have the case entered on the calendar of causes for the term.(4) Causes must be noticed for hearing for the first day of term, or for as early a day in term as practicable. The note of issue specifying the class to which the cause belongs, and the time from which it is entitled to priority, shall be delivered to the register, assistant register or clerk, who is to make up the calendar four days previous to the commencement of the term. But if the cause is not in readiness for hearing in time to notice it for the first day in term, it may be placed at the foot of the calendar; and if the bill has been taken as confessed, may be heard out of its regular order.(5) Beside the necessary papers for the court, the complainant must be ready with such exhibits as may be read or proved on the hearing. A document stated in the bill, and admitted in answer cannot be read from the bill at the hearing, but must be produced.(6) If the execution merely of the exhibit (that is, deeds, writings or other documents, as evilence in the cause) is not admitted in the answer, and he proof of it will be of the hand writing only, this nay be done at the hearing, upon a previous order or nolice to the opposite party for that purpose served according to former practice, four days before term,(7) and accurately describing by date, parties, &c. the document to be proved. A subpœna for witnesses may then be taken out and served.(8) Copies of the pleadings, pro-

§ 71. No order to set down; note of issue Causes to be noticed for the first day of term.

§ 72. Exhibits to be read or proved at the hearing.

(4) R. 88.
(5) R. 92.
(6) 1 Jacob 339.
(7) see R. 75. see 1 J. Ch. 550. 2 J. Ch. 481. 17 Ves. 355. Bla. 155. 154. Eq. Draft. 602.
(8) see 2 R. S. 179. § 69. Bla. 154-6. But the precipe. is virtually abolished, ante ch. 2. § 27. p. 34.

§ 73. Papers to be furnished; abbreviation of pleadings; points; draft; minutes of decree; case; brief.

perly certified, paged and endorsed [ch. 2. § 9.] should be in preparation for the court. When a cause is heard or submitted on bill and answer, [or on plea or demurrer, ante ch. 8. § 25. 30.] except in mortgage and partition causes, where the complainant's rights are not contested, the court must be furnished with copies of the pleadings, and an abbreviation thereof, not exceeding one sixth of the number of folios contained in the originals; and the necessary papers must be delivered to the court when the hearing of the cause shall commence,(9) and must be furnished by the complainant. Each party must deliver to the court and the adverse party a copy of the points on which he relies, and may also deliver to the court and adverse party a draft of the minutes of the decree to which he conceives himself entitled.(10) [see ch. 2. § 27. ch. 6. § 1.] No case is required by the rules, where the cause is set down on bill and answer merely, as it is upon pleadings and proofs,(11) as directed in the next chapter. But an abbreviation of the pleadings above required, is a sufficient substitute. A brief for counsel is another preparatory step, and may consist of the bill and answer abbreviated; copy of the report and depositions also abbreviated, where a reference had taken place; also a full and accurate statement of the case, consisting of an explanation of the origin of the suit, the relative situations and circumstances of the parties and their interests; and a description of the subject matter so ample, as to put counsel in possession of every material point which bears upon the case and interests of the client,(12) together with the substance of the decree which the party claims; though this might be answered by annexing to the brief the minutes of the decree which ought to be prepared, submitted, and, if possible, settled on the hearing. These are the materials by which the solicitor frames his brief for counsel. The day of hearing being at hand, it will be requisite to collect and arrange the papers in the cause; all that the brief sets forth or refers to as connected with the case.

(9) R. 93.
(10) R. 94.
(11) R. 90.
(12) Grant.

HEARING AND DECREE.

§ 74. Hearing;—Terms; routine of business in court. Calendar and the order in which causes are to be heard.

The terms of the court, when the hearing is before the chancellor, are prescribed; the stated terms for hearing before the vice-chancellors, are to be respectively appointed by them [ch. 2. § 15.] Allusions have been occasionally made to the calendar and the preferences of causes and matters; but to exhibit in one view the routine of business in court, the general rule will now be given: In making up the calendar, causes to be heard on bills taken as confessed shall have a preference, and shall be entered according to priority from the date of the order to take the bill as confessed. Pleas and demurrers shall constitute the second class of causes, and have priority from the time when the plea or demurrer was filed. Causes to be heard on bill and answer shall occupy the third place on the calendar, and have priority from the time when the answer was put in. Those which are to be heard on the pleadings, or on pleadings and proofs, shall form the fourth class, and have priority from the time when the replication was filed. Causes to be heard on exceptions, or upon the equity reserved in a decretal order, shall be placed in the class to which they belonged before the decretal order or reference, and according to their priority as it then existed; and causes for rehearing shall be arranged in the same manner. Appeals from orders, decrees, or sentences of the vice-chancellors, or surrogates, when necessary to be placed on the calendar, shall have priority in the several classes from the time when the matter arose before the vice-chancellor or surrogate.(13)

§ 75. Default at hearing; dismissing bill for want of prosecution; taking default; opening hearing; reading answers, objecting for want of parties; Replication allowed to be filed.

If the cause is noticed for hearing on the part of the defendant, and the complainant does not appear to argue on his part, or does not furnish the necessary papers, agreeably to the preceding rules, the bill may be dismissed with costs. If noticed on the part of the complainant, and the defendant does not appear at the hearing, and furnish the necessary papers on his part, the complainant may have such decree as he is entitled to by the defendant's default, according to the usual course and

(13) R 91.

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practice of the court.(14) If the cause be upon bill and answer, as the defendant was precluded by the omission of complainant to reply, from going into proof, he is entitled to read his whole answer.(15) After opening the pleadings, and before merits gone into, is the regular time for objecting for want of proper parties, though such objection may be made after the cause gone into and heard. If objections be taken and allowed, the court may permit the cause to stand over, on costs of the day, (if defendant make the objection in his answer) to give complainant an opportunity to amend by adding parties, though the bill has been sometimes dismissed for want of parties with costs.(16) A replication has been allowed to be filed even after cause brought to hearing on bill and answer; as where the court not having seen sufficient cause to make a decree for want of sufficient matter confessed dismisses the bill; but the replication is upon payment of costs, which, if not paid, the dismission will stand.(17)

§ 76. Advancing the cause, cross suits; no subpœna to hear judgment; decree.

It rests in the breast of the court to advance the hearing of a cause, on sufficient allegations by counsel on motion or petition. An apprehension of the approaching death of a party, the near expiration of a term of years, or other urgent consideration, have been deemed sufficient. So in case of cross suits, where two causes between the same parties involve the same point, and it is material for both to be heard together, the cause standing last may be thus advanced, or the other adjourned so that they may both come on together, and depositions in one may be ordered to be read in the other. (18) The subject of hearing and decrees will be more particularly treated in the second volume, by way of explanations and practical directions to the forms of decrees there given. At present it may be observed, that no subpœna to hear judgment is necessary.(19) The decree is either pronounced and settled at the hearing [ch. 2. § 27, 28] or afterwards, and is either interlocutory or

(14) R. 96. 4 J. Ch. 300. 310.— See Eq. Draft. 575. 584. 582. 601.
(15) Grant. But see post, ch. 9. § 1.
(16) Grant. Newl. see Eq. Draft. 574-5.
(17) Grant. Harr. Wy. Pr. Reg. sec Eq. Cas. Abr. 43.
(18) Grant.
(19) 2 R. S. 181.

§ 77. Decree: interlocutory or final; reference, &c. pursuant to the decretal order, equity reserved &c. reference to take an account.

final, and if final, it is seldom absolute in the first instance, unless declaratory merely of the rights of parties; but in order that it may be consummated, the directions of the decree must be pursued, and ulterior proceedings will therefore become necessary, as upon decree for sale, for instance, in suits for foreclosure [see ch. 7. § 17.] or partition [ch. 5. § 39.] or reference to settle alimony, &c. in divorce [ch. 7. § 28.] The decree is interlocutory where issues on matters of fact are directed; or points of law reserved for the opinion of the common law judges, or accounts are to be taken, or incumbrances or debts to be enquired into, &c.(20) Where such references had been made before hearing, as in the cases enumerated of bills for partition, foreclosure, divorce, specific performance, redemption of mortgage, &c. [see ch. 7. § 13] and ante § 66-7.] no further interlocutory decree would probably become necessary; but the decree final for the sale, partition, divorce, specific performance, redemption, &c. would, as before observed, require further proceedings, for the purpose of giving effect to the decree, and previously to its enrolment or execution. A final decree is when all the facts are ascertained so that the court can decide on the merits [ch. 2. § 28.] Such facts must therefore be ascertained by reference, &c. before or after hearing; or by admissions in the answer, otherwise the final decree cannot be pronounced. If an answer admit sufficient to ground a decree final, it may be pronounced, and yet such decree may also require further measures, in order to give it effect. The decree to account may be final where consequential directions are given, and may be grounded on admissions in answer, or on proofs taken upon an issue by replication as in the next chapter. But it is usually interlocatory; the principles on which the account is to be taken are settled in the decree(21) the reference to take and state the account forms a part of the decretal order, and consequential directions, costs, or other equity reserved.(22) The

(20) Grant. Hinde. see Bla. 163. 281. as to final decree.
(21) 20 J. 690. 2 Wend. 77, 78.
(22) See form of a decree on reservation on further directions. Eq. Draft. 656-8. see *post* vol. 2. ch. viii. ix. forms of different decrees with explanatory remarks, &c.

cause will then upon report coming in be set down on the directions, or equity reserved, for final hearing and decree; so, also, if upon the report being filed, and the order of course entered to confirm it, exceptions should be taken, the cause must be brought on upon the exceptions, and for further directions previously to a final decree. The general proceedings upon a reference to take and state an account(23) are similar to those already described [§ 67.] The production of books, examination of the accounting party, mode of accounting, separate reports, &c. are in some measure now governed by express rule of court. [ch. 2. § 44. 50, 51.] The further proceedings if exceptions be filed, which must be grounded upon objections previously taken, are also as directed. [ante § 67-9] The final decree cannot be enforced by execution until it is enrolled, and is subject also to be opened, set aside or modified, previously to such enrolment, by rehearing, [ch. 2. § 56.] appeal, [ib. § 62.] supplemental bill in nature of review (24) or after enrolment [ch. 2. § 83.] by appeal, by bill of review (25) or bill to impeach decree on ground of fraud.(26) On filing a bill of review, or other bill in the nature of a bill of review, the complainant must make the like deposit *or* give security to the adverse party in the same amount, which is, or would be required on an appeal [see ch. 2. § 68, 69. 73.] from the order or decree complained of; and no such bill can be filed, either upon the discovery of new matters or otherwise, without special leave of the court first obtained, nor unless the same is brought within the time allowed for bringing an appeal. [see ch. 2. § 67. 72.](27) But the decree, whether for complainant or of general dismissal of bill in favor of defendant,(28) or in

§ 78. Final decree, costs, enrolment, rehearing, appeal, bill of review; execution and satisfaction.

(23) See further Bla. 221. &c. Hoff. Mr. 7, &c.

(24) 2 J. Ch. 488. 205. Leave to file a supplemental bill, in the nature of a bill of review, to introduce new evidence, refused, where the proper means of searching for it had not been used previously to the decree. 1 Jacob 243.

(25) 1 Paige, 263. see ante ch. 6. § 2.

(26) 4 J. ch. 199. ante ch. 2. § 56.

(27) R. 173.

(28) See ch. 2. § 28. ch. 7. § 15. 17. 18. see Eq. Draft. 588. 285.

favor of one defendant against another(29) as mentioned in the next chapter, being finally consummated, whether before or after rehearing, appeal, &c. the costs are then made up and taxed [ch. 2. § 80-83.] the decree enrolled, docketed, &c. execution if necessary issued to enforce it [ib. § 83-5.] and when satisfied, cancelled of record. [ib.]

(29) 1 Paige 263.

CHAPTER IX.

REPLICATION,

AND DECREE

UPON PLEADINGS AND PROOFS.

§ 1. Replication and proceedings to decree upon pleadings and proofs, when a replication should be filed.

If defendant deny or do not admit complainant's case, or set up new and material matter, the complainant supports his own allegations, and denies those of the defendant by a replication; and the defendant, according to the English rule, is then put to the proof of *his* case.(1) Matters set up in an answer, by way of avoidance, and not necessarily drawn forth by the bill, must, after a general replication, be proved, or the defendant cannot avail himself of them.(2) Where *an answer* is put in issue, what is confessed and admitted need not be proved; but where the defendant admits a fact, and insists upon a distinct fact by way of avoidance, it was formerly held that he must prove the fact so insisted on in defence.(3) But the rule as now settled in the court of errors is as heretofore stated, [ch. 8. § 65.] that an answer responsive to the bill, and within the discovery sought is legal evidence in all cases, whether it be a denial of some fact alleged by complainant, or sets up a fact by way of avoidance merely.(4) The object of the replication is to put the answer in issue, if sufficient be not confessed in the answer to ground a decree upon, and enable complainant to set down the cause for hearing upon bill and answer only, without going into evidence; but if sufficient be confessed, and the cause set down on bill and answer, as has

(1) 19 J. 505. 14 J. 63. 501. Bla. 126-7. Grant. Wy. Pr. Reg.
(2) 14 J. 63.
(3) 2 J. Ch. 62. see 1 J. Dig. 225. 346.
(4) 1 Cowen 711. 744.

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appeared in the last chapter, then, as defendant cannot support his answer by testimony, the whole of it would be taken as true, [ch. 8. § 65.] and might be read at the hearing,(5) except in the case of an infant plaintiff, where, by the English rule, though replication be not filed, yet, as an infant can admit nothing, the defendant is not exonerated from proving the facts of his answer; replication therefore is always filed, and proofs gone into, even in the most amicable suits, wherein an infant is plaintiff, as the court must always have every thing either proved or admitted.(6) A bill pleaded to, if plaintiff wish to take issue upon the truth of the plea, replication is necessary.(7) [see ch. 8. § 30.] Though complainant should not, unless he dispute the facts, reply to a plea or disclaimer, yet if the bill be answered in part, and pleaded to in other part, and plaintiff reply to the plea, he must, to avoid irregularity, also reply to the answer; so, if the disclaimer be to part, and an answer to other part.(8)

§ 2. At what stages of the suit a replication been allowed to be filed, or withdrawn, and for what purpose; amendment, &c.—supplemental answer after replication.

It has been seen that a replication has been allowed to be filed even after cause brought to hearing on bill and answer.[ch. 8. §] So a replication has been permitted to be filed *nunc pro tunc*, where it had been accidentally omitted before examination of witnesses, even at hearing, or after decree;(9) on the other hand, leave has been given under special circumstances to withdraw a replication and file exceptions to the answer *nunc pro tunc*.(10) The general rule however is, that such withdrawal must be for the purpose of amendment, and then, according to the English practice, it is on motion of course on costs; but in some cases the court has required plaintiff to show the materiality of the amendment, and why not done before.(11) It has been held that an amendment of the bill may be before, but not after examination of witnesses, unless complainant withdraw his replication,(3) but not then unless under special circumstances, or in consequence of some subsequent event, except to add parties;(4) And he cannot

(5) Grant. Harr. Hinde.
(6) Grant c. 2 Atk. 377. 3 P. W. 237 Newl.
(7) Grant c. 2 Dick. 510.
(8) Grant c. 2 Vern. 46. Wy. Pr. Reg.
(9) Grant c. Mos. 296.
(10) 1 M'Cleland 341.
(11) Grant c. 3 Ves. and B. 20. 3 Atk. 365. 3 Anst. 807. Eq. Draft. 576.
(3) Bla. 210. 212.
(4) 4 J. Ch. 263.

withdraw without showing the materiality of the amendments and why they had not been stated in the bill. (4) Where he cannot amend he should apply for leave to file a supplemental bill.(5)

A replication was allowed to be withdrawn, and bill amended, by striking out the name of a plaintiff, and making him a defendant, and by stating such facts and circumstances relating to certain transactions between that plaintiff and the defendant, as were material to show, that the other plaintiffs were not, and ought not to be, bound by the acts or misrepresentations of that plaintiff, respecting the property in the pleadings mentioned, or the purchase thereof, and as were material to show, that such acts and misrepresentations of the said plaintiff were evidence against the defendant; the plaintiffs who made the application giving security for costs to the satisfaction of the master, and undertaking to amend within a given time, paying the costs of the application, the usual costs of the amendments, and withdrawing the replication; the *extra* costs of the amendments to be costs in the cause. (6) To obtain leave to withdraw a replication and amend a bill after an order to dismiss it for want of prosecution, the proposed amendments must be previously stated to the court.(7) And after plea and replication, and before plea set down, it is not a *motion of course* to withdraw the replication and amend the bill.(8) A defendant has been permitted, after replication, to file a supplemental answer to a bill for dower, in order to state a fine and non-claim omitted through ignorance.(9)

§ 3. Cause at issue on filing replication. No special replication without leave, time allowed to reply.

Every cause shall be deemed at issue on filing a general replication to the answer; and no special replication shall be filed but by leave of the court, on cause shown. If the complainant does not reply to the defendant's answer within ten days after it is deemed to be sufficient, he shall be precluded from replying, and the cause shall stand for hearing on bill and answer; and either party may notice it for hearing as soon as it is in readiness for hearing against the other defendants, if

(4) 2 J. Ch. 425. 4 J. Ch. 363.
(5) 4 J. Ch. 363.
(6) 2 Younge and Jervis 512.
(7) 1 M'Cleland 517.
(8) 1 Turn and Russ. R. 23.
(9) 1 Simons 505.

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§ 4. Further time to reply; filing and serving general replication.

any there are.(10) Further time to file a replication not exceeding twenty days, may be granted by a vice-chancellor or injunction master, on cause shown by affidavit on such terms and conditions as he may direct. But no such order for time shall be granted by an injunction master or a vice-chancellor out of court, after the time for filing a replication has expired, or where time has before been granted by order of the court, or by a vice-chancellor or master, or by the agreement of the opposite party.(11) But the court upon special cause may extend the time to put in or serve any pleading.(12) Replications are general, insisting merely on the truth of the allegations of the bill, and denying those of the answer; by which the defendant is put to the necessity of proving his case,(13) so far as his answer sworn to is not responsive to the bill, as mentioned, or where the complainant had in his bill distinctly waived an answer on oath [see ch. 8. § 39. 38.] The replication is not sworn to, or signed by counsel.(14) It is filed and a copy served.

§ 5. Bill for divorce, if facts are denied, the complainant must file replication, and may apply for feigned issue without an order to produce witnesses.

On a bill for a divorce, or to avoid or annul a marriage contract for any other cause than physical incapacity, if the material allegations in the bill are denied in the answer, and the complainant do not file a replication within the time allowed by the rules of the court, the defendant, on due notice, may apply to have the bill dismissed; but if a replication be filed, either party, without entering any order to produce witnesses, may, on the usual notice to the adverse party, apply for a feigned issue.(15) The defendant in the answer may set up the adultery of the complainant, or any other matter which would be a bar to a divorce, separation, or the annulling of a marriage contract; and if an issue is taken thereon, it shall be tried at the same time and in the same manner as other issues of fact in the cause.(16) As the complainant must prove the facts denied by the answer, and alleged in his replication by two witnesses or one and corroberative circumstances to outweigh defendant's oath, unless such oath had been waived by the bill, [ch. 8. § 39. 65.] The complainant by a previous examination of testimony not only of his allegations but

(10) R. 65.
(11) R. 125.
(12) R. 126.
(13) Grant. Harr. Hinde. Newl.
(14) Bla. 126.
(15) R. 167.
(16) R. 168.

of the execution of deeds if contested must come to the hearing prepared. The *viva voce* testimony on the hearing founded on a previous order or notice(18) has been spoken of in the last chapter. [§ 70.] But it is essential to know what exhibits must be proved before examiner, or cause shown on hearing why they were not.(19) The rule(20) upon this subject will be presently given.

COMMISSIONS AND EXAMINATIONS.

§ 6. Dedimus potestatem to take testimony and examination of witnesses before vice-chancellors, commissioners or examiners. Commissions to take testimony, proceedings to obtain; powers of commissioners; witnesses, how examined, &c. when before vice-chancellor, ib. on order of chancellor; not then to be otherwise examined, rules to be prescribed; testimony, how taken.

The issuing of commissions to take proof, and the examination of witnesses, before a vice-chancellor, commissioner, or examiner, are particularly regulated by the revised statutes and rules.(1) The chancellor may direct a commission to be issued, to any person or persons, to take testimony in any cause depending in the court of chancery. The vice-chancellors may also direct such commissions to be issued, in those causes which they are respectively authorised to hear, by the provisions of the statute. Such commission may also be issued by the register, assistant register, or either of the clerks, under such regulations as the chancellor may from time to time prescribe. Such commission shall be issued, upon the petition of the party desirous that such testimony should be taken. The petition must name the person or persons to whom the commission is prayed to be directed; and such notice of the application shall be given to the adverse party, as the chancellor shall, by a general rule of court, direct. The person or persons so commissioned, shall have full authority to administer all necessary oaths or affirmations, to all witnesses examined under the commission. The respective parties and their counsel, may be present at the examination of any witness, produced before a vice-chancellor or an examiner, or under a commission; and every such witness

(18) See 2 J. Ch 146. Bla. 154,155-6. 60. appx. Eq. Draft. 602.
(19) Ib. 2. J. Ch. 481. 182.
(20) R. 75.
(t) As to dedimus potestatem to take testimony in or out of the state, and examinations according to the former practice, see Bla. 415-423. and 37. appx. 132. & appx. 99-108. see 1 Hopk. 362. 2. Wend. 71. per Spencer senator. 6 Cowen, 416. 156. 5 J. Ch. 191. 1 J. Dig. 356-361.

may be examined, cross-examined, and re-examined orally. Whenever it shall appear to a vice-chancellor, that it is expedient that the witnesses in any cause authorised to be heard by him, should be examined in the presence of such vice-chancellor, he shall order such examination to be had accordingly, either at a stated or special term. Whenever it shall appear to the chancellor, that it is expedient that the witnesses in any cause not authorised to be heard by a vice-chancellor, should be examined by a vice-chancellor, the chancellor shall order such examination to be had before any vice-chancellor to be designated by him. Whenever any order for the examination of witnesses shall have been made, as provided in the two last sections, no witness shall be examined by either party, before an examiner, or upon a commission, without the special direction of the chancellor or vice-chancellor making such original order. The chancellor shall prescribe rules for the examination of witnesses, so that an order may be entered by either party, requiring the adverse party to proceed and finish such examination, within such time as the chancellor shall, by general rules, direct, and precluding any further or other examination of witnesses, after the expiration of such time, without the special order of the chancellor, or of the vice-chancellor authorised to hear the cause. The chancellor may, from time to time, make such rules as he shall think proper, concerning the examination of witnesses, before examiners or commissioners within this state, and concerning the use of written interrogatories for the examination of witnesses residing out of this state. The testimony of all witnesses shall be reduced to writing; and when taken before a commissioner or examiner, shall be signed by the witnesses and filed in the office of the clerk of the court, or register, or assistant register, in which the bill and other proceedings in the cause shall have been filed.(2)

§ 7. Order to examine witnesses in presence of vice-chancellor.

Where a cause is at issue by a replication to a plea, or to the defendant's answer, if either party desires an examination of the witnesses in the presence of a vice-chancellor, he may, at any time within ten days after the replication is put in, give notice of an applicatiun for

(2) 2 R. S. 181. 2.

that purpose; but an order for such an examination shall not be granted without sufficient cause shown, whether the application be opposed or not. And no such order shall be granted until the cause is at issue, or in readiness for hearing, against all of the defendants, except in special cases.(3)

§ 8. Order to produce witnesses, and time allowed to close proofs.

If notice of an application to have the witnesses examined in the presence of a vice-chancellor is not given within the time prescribed, or the application is denied, either party may have an order of course, to produce witnesses within forty days after notice of the order; and at the end of forty days, on filing an affidavit of the service, or of the receipt of such a notice, an order may be entered that the proofs in the cause be closed.(4) But the time to produce witnesses may be enlarged as hereafter mentioned.

§ 9. Commission to take testimony in, or out of the state; petition to the register, assistant register or clerk. Adverse party may join in commission; and how.

If a party wishes to examine witnesses residing out of the state, or more than twenty miles from an examiner, and where no order has been made to examine the witnesses in the presence of a vice-chancellor such party may, at any time within twenty days after he has received or served a notice of the rule to produce witnesses, present a petition to the register, assistant register, or either of the clerks, stating the names and residence of the witnesses, and of the persons proposed as commissioners, and praying that a commission may be issued to take the examination of such witnesses; and the like notice of the application shall be given to the adverse party, as is required in cases of special motions. If the adverse party do not appear and join in the commission, or object to the persons named as commissioners, a commission shall be issued agreeably to the prayer of the petition.(5) If the adverse party wish to join in the commission, he must, at the time of presenting the petition, furnish the names and residence of the witnesses on his part, and they shall be inserted in the commission. If he is not satisfied with the commissioners named in the petition, he may name commissioners on his part; and the register, assistant register, or clerk to whom the petition is presented, after hearing the allegations of the parties, shall designate a suitable person, or persons, to execute the commission, and issue the same

(3) R. 67.
(4) R. 68, see former practice Bla. 134-6
(5) R. 69.

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accordingly; but any of the commissioners named in the commission may execute the same, in case the others neglect or refuse to join in the execution thereof, or they are, from any cause, prevented.(6)

§ 10. Applications for special commissions.

If it shall be necessary to have a commission to take the examination of witnesses in any case not provided for in the preceding rules, or after the expiration of the time therein limited for making an application to the register, assistant register, or clerk, the party may present a petition to the court for that purpose, setting out the facts which entitle him to a special commission; and the usual notice of the application shall be given to the adverse party.(7)

§ 11. Witnesses out of the state to be examined on interrogatories.

Witnesses examined out of the state, if the parties do not consent to an oral examination, shall be examined on written, direct and cross interrogatories, to be allowed by a vice-chancellor, or master, and annexed to the commission. And no notice of the time and place of executing such commission out of the state shall be necessary; but the like notice of the time and place of examining witnesses in this state shall be given to the adverse party, as is required for the examination of witnesses before an examiner.(8)

§ 12. Order for the examination of party as a witness.

Where a party wishes to examine a defendant as a witness against a co-defendant, or against the complainant, he may, at any time within twenty days after he has received or served a notice of the rule to produce witnesses, on filing an affidavit that such defendant is a material witness, and is not interested in the matter to which he is to be examined, have an order of course for the examination of such defendant as a witness, as to any matter in which he is not interested; subject to all just exceptions. And such defendant shall thereupon be examined to such matters in the same manner as other witnesses; but the adverse party at the hearing may object to the competency of his testimony.(9)

(6) R. 70.
(7) R. 71.
(8) R. 72.
(9) R. 73. As to examination of parties, see ch. 8 § 67. Plaintiff can not obtain leave to examine a co-plaintiff on giving security for costs, 1 Jacob 577.

§ 13
Notice of the examination of witnesses. Documentary evidence. Subpœna to compel attendance of witnesses.

It shall not be necessary to show witnesses prior to examination; but notice of the examination, and of the names, places of abode, and additions of the witnesses, shall be given to the adverse party at least ten days before the examination, if his solicitor resides more than fifty miles from the place of examination, and in all other cases at least six days.(1) Documentary evidence which is not made an exhibit before the commissioner or examiner, or set out or distinctly referred to in the pleadings, shall not be read on the hearing, unless notice of the intention to use it at the hearing was given to the adverse party at least ten days before the expiration of the time allowed to produce proofs. And no deed or other writing shall be proved at the hearing, except on an order previously obtained, after due notice to the adverse party.(2) Process of subpœna to compel the attendance of witnesses, before a vice-chancellor, master, examiner, or commissioner shall issue of course, and the time and place of attendance shall be specified in the writ; and such witnesses may be punished for contempt if they fail to attend and submit to an examination. But no witness shall be compelled to appear before an examiner or commissioner more than forty miles from his place of residence, unless by special order of the court.(3)

§ 14.
Vice chancellor may fix time for taking testimony before him. And may postpone examination on terms.

If the time and place for taking testimony in the presence of the vice-chancellor is not designated in the order requiring it to be so taken, the party obtaining the order shall within ten days thereafter apply to the vice-chancellor to assign a time and place for that purpose, and shall give to the adverse party at least fifteen days notice of the time and place so assigned. If he shall neglect to apply and give such notice within the time prescribed, the adverse party may consider the order as abandoned, and obtain a rule of course to produce witnesses in the usual form; or he may apply to the vice-chancellor and give notice of the time and place assigned by him. If any material witness cannot be procured at the time and place appointed, or assigned, the vice-chancellor may postpone the taking of the testimony till

(1) R. 74.
(2) R. 75.
(3) R. 76.

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Testimony, how taken before vice chancellors.

some future day, on payment of costs or otherwise in his discretion, and upon such terms and conditions as he may think proper.(4) Where witnesses are examined in the presence of a vice-chancellor, the testimony shall be taken down in the mode which is usually adopted on trials at *nisi prius*; and he may decide all questions which arise as to the competency of witnesses and the relevancy of testimony, or may, in his discretion, reserve any such questions until the hearing. An order for the examination of a defendant as a witness against the complainant or a co-defendant, subject to all just exceptions, may be made by the vice-chancellor on the usual affidavit; but such order shall not be granted after the examination of other witnesses has commenced, unless a sufficient excuse is shown for the delay; and such notice of the application shall be given to the adverse party as the vice-chancellor may deem reasonable.(5)

§ 15. The bill may be dismissed for want of proof.

After the testimony on the part of the complainant is closed, and before the defendant proceeds to examine any witnesses on his part, he may move the vice-chancellor before whom the testimony is taken, to dismiss the bill for want of proof; and if he is satisfied that the evidence on the part of the complainant, in connection with the admissions in the answer, is insufficient to sustain the suit, he may, in his discretion, decree a dismission of the bill, or reserve the question till the hearing.(6)

Parties to proceed de die in diem before the vice chancellor.

The parties shall proceed de die in diem with the examination of their witnesses before the vice-chancellor, unless he shall adjourn for his own convenience to a more distant day; and all documentary evidence, not set forth or distinctly referred to in the pleadings, which either party wishes to use on the hearing, shall be produced before the examination is closed, and marked as exhibits, unless notice of the intention to use the same on the hearing is given to the adverse party before the examination commences.(7)

Testimony to be drawn up by the party who obtained the order.

Within four days after the examination is closed, or within such further time as may be allowed by the vice-chancellor for that purpose, the solicitor for the party who obtained the order to take the testimony before the vice-chancellor shall draw up a

(4) R. 77.
(5) R. 78.
(6) R. 79.
(7) R. 80.

statement of the same, or of so much thereof as is material to be engrossed and filed, and shall serve a copy thereof on the solicitor for the adverse party, with a notice to appear before the vice-chancellor to have the testimony settled. Such adverse party shall have the usual notice required on special motions, and may propose amendments in writing to the statement of the testimony. The vice-chancellor may correct any errors or omissions in the statement of testimony, whether amendments are proposed or not. After the same is settled by the vice-chancellor, it shall be correctly engrossed by the clerk residing in the circuit of such vice-chancellor, and certified by him, and filed in his office.(8)

§ 16.

Vice chancellor may direct it to be taken down in form at time of examination.

Instead of taking down the testimony of witnesses examined before a vice-chancellor in the form prescribed in the preceding rules, it may, in the discretion of such vice-chancellor, be taken down at the time of the examination, by the clerk, and be signed by the witnesses, in the mode in which testimony is taken before an examiner.(9)

Parties to furnish names of witnesses before any are examined.

Before the commencement of the examination of any witnesses, those examined out of the state or de bene esse excepted, the parties respectively shall deliver to each other, or to the officer before whom the examination is commenced, the names of the several witnesses intended to be examined in the cause, with their places of abode and additions. And no other witnesses shall be examined by either party, without special permission of the court, on sufficient cause shown, after due notice to the adverse party, and on such terms and conditions as the court may prescribe. But it shall not be necessary to furnish the names of witnesses who are examined merely as to the general character of other witnesses.(10)

The manner of taking testimony before examiner.

When testimony is taken before an examiner or commissioner, the direct examination shall be completed and signed by the witness, before his cross-examination is commenced; and such cross-examination shall be completed and signed before he is re-examined by the party calling him; and previous to every adjournment, the testimony, as far as it has been taken, shall be read over to the witness, and be signed

Depositions not to be altered.

(8) R. 81.
(9) R. 82.
(10) R. 83.

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by him. He may be permitted to explain or correct any mistake made by him, at any time before his examination is finally closed; but no part of his testimony, previously reduced to writing, shall be erased or altered. The examination of each witness shall proceed de die in diem until it is completed; and after his examination is finally closed, he shall not be again examined to the same facts without the consent of the adverse party, or by order of the court, on sufficient cause shown. But he may be re-examined as to any new matter arising out of the testimony of other witnesses.(11)

§ 17. Objections to testimony to be made before examiner.

On the examination of a witness before an examiner or commissioner orally, if the witness is objected to as interested or otherwise incompetent, or any interrogatory is objected to as improper or irrelevant, the examiner or commissioner may reserve the question, or decide upon the objection, as he may deem proper. If he reserves the question, or decides against the objection, he shall note the same and proceed with the examination. If he decide in favor of the objection, the testimony may be taken down if insisted on by the solicitor or counsel of the party against whom the decision is made. In such case the objection and decision shall be noted; and the party making the objection may, at the hearing, on due notice for that purpose, apply to have the deposition suppressed, or the objectionable testimony expunged, with costs to be paid by the adverse party, or by his solicitor or counsel, as the court may direct; and no objection to the competency of a witnesss hall be made at the hearing, unless such objection was made before his testimony was closed.(12)

§ 18. Orders to enlarge time to produce witnesses.

One order to enlarge the time to produce winesses may be granted, on sufficient cause shown, without notice to the adverse party; but an ex parte order shall not be granted after the time to produce witnesses has actually expired, nor shall a second order be granted to the same party, except on the usual notice of the application to the adverse party, and upon such terms as the court may prescribe.(13) Within ten days after the order to close the proofs is entered, the examiner, on being ap-

Examiners to file depositions within ten days after the testimony is closed.

(11) R. 84.
(12) R. 85.
(13) R 86.

plied to for that purpose by either party, shall cause the depositions and exhibits taken and produced before him to be returned and filed with the register, assistant register or clerk. And he shall not be entitled to receive pay for taking any depositions or marking any exhibits which are not returned and filed with the proper officer, within ten days after service of a notice of the order to close the proofs. Neither shall a copy of any deposition or exhibit be read on the hearing, unless the original has been returned and filed in the proper office.(14)

The proofs should be made as full as the nature of the case will admit, that the supplementary proof where a reference to a master afterwards becomes necessary may be as limited as the rights and responsibilities of the parties will admit.(1) The closing of the proofs is equivalent to the former practice of *passing publication*,(2) before which a cross bill [ch. 8. §] might be filed(3) and after which depositions might be amended to correct mistakes, re-examination take place under special circumstances, and the credit or competency of witnesses impeached.(4) If after closing proofs, another defendant is made party by supplemental bill, the proofs must be re-opened; if the cause should go to hearing and decree without, it would be reversed.(5)

§ 19. Preparations for hearing;

After the proofs are closed either party may notice the cause for hearing at the next or any subsequent term.(6) No order to set the cause down for hearing is necessary, but when in readiness for hearing on the pleadings and proofs, it may be noticed accordingly, and entered on the calendar. [see ch. 8 § 71.] The notice,

(14) R. 87.
(1) 2 J. Ch. 495.
(2) See Bla. 146-150. 5 J. Ch. 189. 1 J. Dig. 356. &c.
(3) 7 J. Ch. 250. 4 J. Ch. 357. 1 J. Ch. 62.
(4) 4 J. Ch. 649. 412. Bla. 149-151. 19 J. 496. 505.
(5) 1 Hopk. 576.
If a bill is amended by adding parties after witnesses have been examined, their depositions cannot be read against the new parties. 1 Sim. 1.
When after depositions suppressed for irregularity, a re-examination is permitted, all the same witnesses must be examined and cross examined. 1 Jacob 83.
Interrogatories and depositions not to be referred on motion of course before the hearing for impertinence alone without scandal. 1 Jacob 625.
(6) R. 88.

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§ 20. Case and abbreviation of the pleadings. Notice note of issue, copies, exhibits, points, draft minutes.

notes of issue, preparatory papers, brief, and requisite steps prior to hearing are similar to those upon bill and answer. [ch. 8. § 71-3] But when a cause is heard or submitted, on bill, answer and replication, or on the pleadings and proofs, if the parties do not agree upon a case, to be signed by them, containing, with all requisite brevity, a statement of the pleadings and proofs, the complainant shall furnish the court with a case, stating the time of filing the bill, the change of parties, if any has taken place pending the suit, and a very brief history of the proceedings in the cause, and an abbreviation of the pleadings only, and not exceeding one sixth of the number of folios contained in the original pleadings respectively.(8)

And in addition to the case, so required, if the cause be heard on bill answer and replication, or on pleadings and proofs, the court must be furnished with copies of the pleadings, and of the depositions, if any, and with short abstracts of the exhibits.(9) The necessary papers must be ready to be delivered to the court when the hearing of the cause shall commence,(10) and furnished by the complainant; but on a hearing upon pleadings and proofs, each party must furnish copies of the testimony and abstracts of the exhibits on his part only. And each party must deliver to the court and the adverse party a copy of the points on which he relies, and may also deliver to the court and adverse party a draft of the minutes of the decree to which he conceives himself entitled.(11) In other respects the prior steps to hearing are also like those upon bill and answer, and it has appeared, [ch. 8. § 74] that causes to be heard on the pleadings, or on pleadings and proofs, form the fourth class in making up the calendar, and have priority from the time when the replication was filed.(12)

§ 21. Hearing; decree, &c.

The subject of hearing and decrees has been mentioned under bill and answer [see ch. 8. §74-8] and will be more particularly noticed in the second volume under the corresponding chapters of the present. It is the practice of the court to order deeds and papers contest-

(8) R. 90.
(9) R. 93.
(10) R. 93.
(11) R. 94.
(12) R. 91.

ed as false and fraudulent to be brought into court for inspection.(1) The decree, as observed, [ib.] may be interlocutory or final, for complainant, or of general dismissal of his bill in favour of defendant; or a decree between co-defendants may be made grounded upon the pleadings and proofs between the complainants and defendants; and the practice is upon the principle of preventing a multiplicity of suits. But such decree to be binding, must be founded upon and connected with the subject matter in litigation between the complainant and one or more of the defendants.(2) If the testimony taken in the cause be insufficient for a decision, the court may direct, on a question of *law*, a special case, [ch. 2. §54.] and on questions of *fact*, settle the same in the various modes noticed, [ch. 2. § 54-5.] by directing a cross bill, bill to bring up all things necessary to a decree, [see ch. 6. § 2.] an action at law, arbitration by consent, award a feigned issue, or order a reference. But it is not a proper course to refer to a master an examination into facts going to the merits or gist of the cause, and as to which proofs have been already taken in chief in the usual way.(3) Supplementary proof may, however, be taken, and a reference directed accordingly, though the prior proofs ought, as observed, [§ 18.] to be as full as the nature of the case would admit.(4) The proceedings upon reference have been pointed out in the last chapter, and other modes of determining facts by feigned issue, &c. in a previous chapter, [ch. 2. § 54.] In such cases the hearing upon further directions, or on the equity reserved by the decree, and consequently the final proceedings in winding up the suit, would necessarily be protracted until the postea and judge's certificate, &c. of the trial, [ch.2 § 55.] the judge's certificate on the question of law submitted by a special case, [ib. § 54.] or the report of master on reference comes in, and if exceptions be taken, until those exceptions be disposed of, when the cause shall have been set down upon exceptions and for further directions as noticed. [ch. 8. § 69] But a feigned issue on exceptions taken, might also be awarded; for instance, on report on title; and the cause might therefore, in addition to the delay occasioned by prior examination, and perhaps re-examination, reference, ex-

(1) 1 Hopk 143.
(2) 1 Paige 263.
(3) Slee v. Bloom. 20 J. 669. s. c. 5. J. Ch. 366. 19 J. 456. see 20 J. 690.
(4) 2 J. Ch. 495.

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ceptions, and perhaps review on second reference directed, be further protracted until the trial, and perhaps new trial of the issue, and possibly also, by a special case or cases upon a point of law in the same suit, upon the determination of which the cause would at last be set down for final hearing and decree upon the equity reserved,(5) and in the manner directed. [§ ib.] A final decree, whether upon pleadings and proofs, reference and report, exceptions and directions, or upon equity reserved, is subject, upon sufficient grounds, to the same rehearing, [ch 2. § 57.] appeal, [ib. § 62.] impeachment and review, as upon bill and answer; [ch. 8. § 78. ch. 6. § 2.] and if finally sustained may, after taxation of costs, [ib. § 80.] and after the expiration of thirty days from the entry of the decree in the minutes, be enrolled and docketed; the transcript of the docket forwarded to the clerks of the supreme court, to secure the lien; [ib. § 84.] execution be issued to enforce the decree, [ib. § 83.] and the lien be cancelled [ib. § 85.] upon return of execution satisfied, or upon due proof of the satisfaction of the decree.

(5) R. 88, 89. *ante.*

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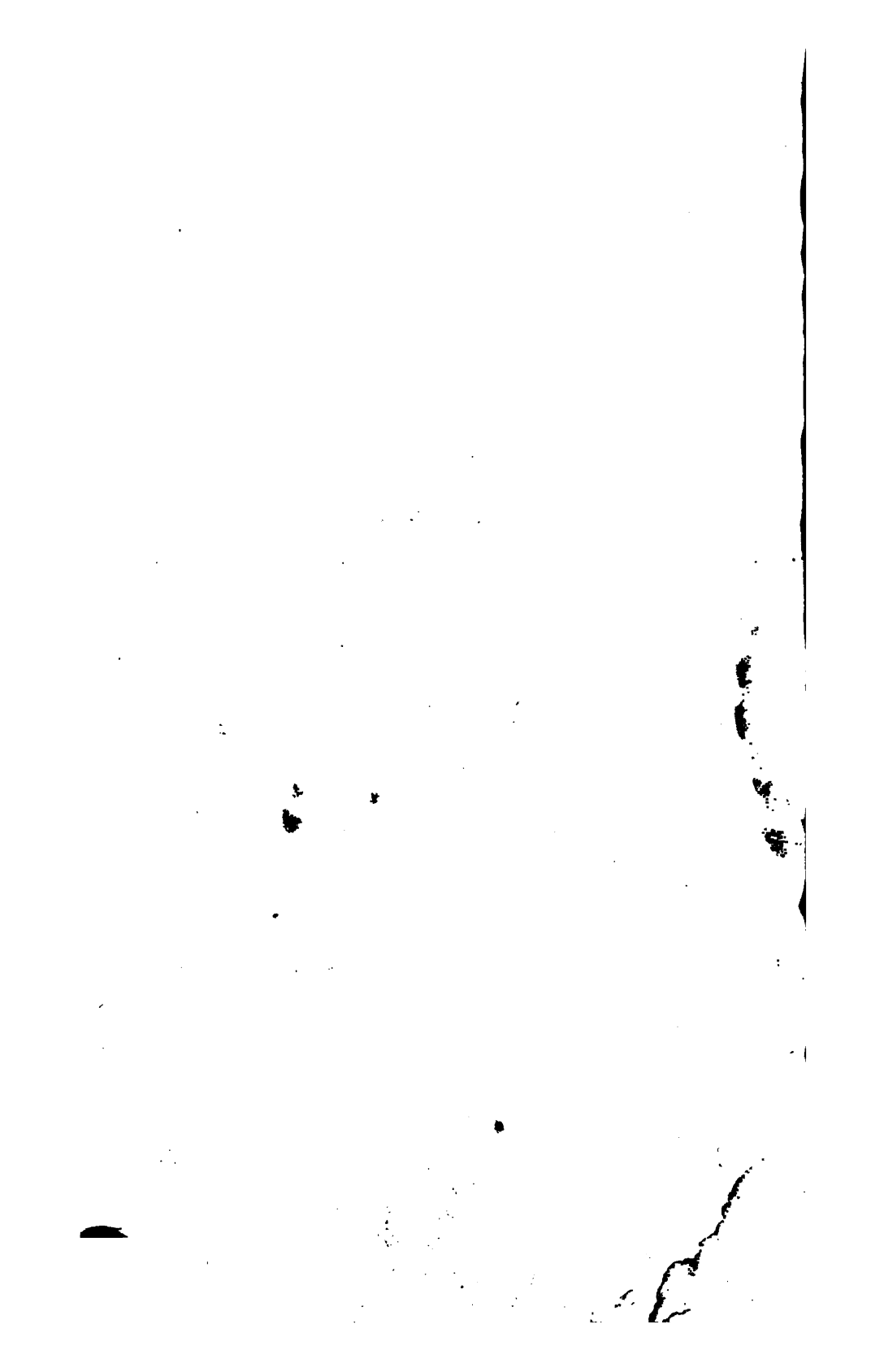

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